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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1940

No. 50

J. E. RILEY INVESTMENT COMPANY, PETITIONER,

vs.

COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED APRIL 11, 1940.

CERTIORARI GRANTED MAY 20, 1940.

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INDEX.

	Page
Proceedings before United States Board of Tax Appeals	1
Docket entries	1
Petition	3
Exhibit—Notice of deficiency	6
Answer to petition	12
Amended petition	14
Answer to amended petition	17
Memorandum findings of fact and opinion, Leech, M.	19
Decision	29
Petition for review and assignments of error	29
Praecipe for record	36
Clerk's certificate	37
Proceedings in U. S. C. C. A., Ninth Circuit	39
Designation of record	39
Statement of points to be relied upon	40
Order of submission	45
Order directing filing of opinion and judgment	45
Judgment	46
Order directing filing of opinion, etc., and denying petition for rehearing	47
Opinion, Healey, J.	48
Dissenting opinion, Mathews, J.	58
Order staying issuance of mandate	59
Clerk's certificate	60
Order allowing certiorari	61

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APPEARANCES

For Taxpayer:
ROBERT ASH, Esq.,
For Comm'r.:
F. B. SCHLOSSER, Esq.

Docket No. 88273

J. E. RILEY INVESTMENT COMPANY,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DOCKET ENTRIES

1937

Mar. 1—Petition received and filed. Taxpayer notified. (Fee paid)
" 2—Copy of petition served on General Counsel.
Apr. 28—Answer filed by General Counsel.
" 29—Amended petition lodged by taxpayer.
" 30—Copy of answer served on taxpayer.
" 30—Motion for leave to file amended petition filed by taxpayer. 5/3/37 granted.
May 4—Copy of motion and amended petition served on General Counsel.
" 10—Answer to amended petition filed by General Counsel
" 12—Copy of answer served on taxpayer.

1938

Jan. 4—Notice issued placing proceeding on Washton, D. C. calendar.

Mar. 19—Hearing set 5/5/38.

Apr. 1—Motion to strike from calendar of 5/5/38 and continue for hearing on or before Oct. 1, 1938 filed by taxpayer.

" 6—Motion to strike from calendar of 5/5/38 and continue for hearing on or before Oct. 1, 1938 granted.

1939

Jan. 11—Hearing set March 2, 1939.

Mar. 2—Hearing had before Mr. Leech on merits. Submitted. On oral motion of petitioner, original petition corrected as to amount of deficiency involved. No objection—granted. Petitioner's brief due 3/31/39—respondent 5/1/39—petitioner's reply 5/17/39.

Mar. 13—Transcript of hearing of March 2, 1939 filed.

" 17—Brief filed by taxpayer. 3/17/39 copy served.

Apr. 24—Brief filed by General Counsel.

May 10—Memorandum findings of fact and opinion rendered, J. Russell Leech, Div. 6. Decision will be entered for the respondent.

" 11—Decision entered, J. Russell Leech, Div. 6.

Jun. 15—Petition for review by U. S. Circuit Court of Appeals (9) with assignments of error filed by taxpayer.

1939

Jun. 15—Proof of service filed by taxpayer.

" 15—Praecipe for the record filed by taxpayer with proof of service thereon. [1*]

United States Board of Tax Appeals

Docket No. 88273

J. E. RILEY INVESTMENT COMPANY,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION

The above-named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency (IT:E:7:8:HFS-90D) dated January 19, 1937, and as a basis of its proceeding, alleges as follows:

(1) The petitioner is a corporation organized and existing by virtue of the laws of the State of Nevada, with its principal office and place of business at Flat, Alaska.

(2) The notice of deficiency, a copy of which is attached, and made a part of this petition by reference, is dated January 19, 1937.

(3) The taxes in controversy are income and profits taxes for the year 1934 in the total amount

*Page numbering appearing at the foot of page of original certified Transcript of Record.

of $3,216.62 of which $1,618.41 is a deficiency asserted by the respondent and $2,598.21 represents an overpayment.

(4) The determination of tax set forth in the said notice of deficiency is based upon the following error: [2]

The Commissioner erred in refusing to permit the petitioner to deduct statutory percentage depletion from income.

(5) The facts upon which the petitioner relies as the basis of this proceeding are as follows:

(a) The petitioner's mines and activities are conducted at Flat, Alaska, which is several hundred miles from the nearest city.

(b) In its income tax return for 1934, petitioner showed gross receipts from its gold miining operations, in the amount of $99,711.56.

(c) The said original return for 1934 did not deduct, or mention, depletion of any kind, either cost or percentage.

(d) During the year 1935, the officers of the petitioner were advised for the first time of the provisions of Section 114 (b)-4 of the Revenue Act of 1934, which permitted taxpayers engaged in metal mining to take a depletion deduction at the rate of 15% of the gross income from the property.

(e) As a result of the information referred to in the preceding paragraph, the petitioner, on or about February 8, 1936, mailed to the Collector of Internal Revenue at Tacoma, Washington, an amended return for 1934, upon which a deduction of percent-

age depletion was taken, in the amount of $13,600.57. The letter accompanying the amended [3] return requested a refund, based upon the depletion deduction referred to.

(f) Upon audit of the return for 1934, the respondent determined the deficiency in tax, based upon the disallowance of certain accrued interest, and refused to allow the depletion deduction.

(g) Petitioner contends that the said depletion deduction is proper.

Wherefore the petitioner prays that this Board may hear the proceeding, and:

(a) Determine that petitioner is entitled to a deduction on account of percentage depletion.

(b) Grant such other and further relief as the Board may deem proper.

(s) ROBERT ASH
Munsey Building,
Washington, D. C.
Attorney for Petitioner.

District of Columbia—ss.

Harry Donnelley, being duly sworn, says that he is the Superintendent and Fiscal Agent of the J. E. Riley Investment Company, above-named; that he is duly authorized to verify the foregoing petition; that he has read the said petition, or had the same read to him, and is familiar with the statements contained therein and the facts stated are true.

(s) HARRY DONNELLEY

Subscribed and sworn to before me this 26th day of February, 1937.

(s) DOIS M. CLAXTON
Notary Public.

My Comm. ex. 2/15/41. [4]

Jan. 19, 1937

IT:E:7:8
RFS-90D
J. E. Riley Investment Company
Flat, Alaska

Sirs:

You are advised that the determination of your income tax liability for the taxable year(s) 1934 discloses a deficiency of $453.50 and that the determination of your excess profits tax liability for the year(s) mentioned discloses a deficiency of $164.91 as shown in the statement attached.

In accordance with section 272 (a) of the Revenue Act of 1934, notice is hereby given of the deficiencies mentioned. Within ninety days (not counting Sunday or a legal holiday in the District of Columbia as the ninetieth day) from the date of the mailing of this letter, you may file a petition with the United States Board of Tax Appeals for a redetermination of the deficiencies above stated.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:C:P-7. The

signing and filing of this form will expedite the closing of your return(s) by permitting an early assessment of the deficiencies, and will prevent the accumulation of interest, since the interest period terminates thirty days after filing the form, or on the date assessment is made, whichever is earlier.

Respectfully,

GUY T. HELVERING,
Commissioner,

By (Signed) W. T. SHERWOOD,
Acting Deputy Commissioner

Enclosures:
Statement
Form 870
Schedules 1 and 2
HFS/1h-3 [5]

STATEMENT

IT:E:7.8
HFS-90D

In re: J. E. Riley Investment Company
Flat, Alaska

Tax Liability for Taxable Year 1934

	Liability	Assessed	Deficiency
Income tax	$4,147.20	$3,693.70	$453.50
Excess-profits tax	1,195.57	1,030.66	164.91

The deficiencies shown herein are based upon the report dated October 26, 1935 of the internal revenue agent in charge at Seattle, Washington, a copy

of which was furnished you. The adjustments are shown in the attached schedules numbered 1 and 2.

Careful consideration has been given to your protest dated February 10, 1936 in connection with the report of the revenue agent in charge; also to your claim for the refund of $2,598.21 and your amended return. The claim will be disallowed for the following reasons.

The claim is based upon an amended return filed on March 3, 1936 which reflects a deduction of percentage depletion of $13,600.57.

Under section 114(b)-4 of the Revenue Act of 1934 taxpayers are permitted to take depletion upon a percentage basis. This section provides, however, that a taxpayer, making his first return under this title, shall state whether he elects to have the depletion allowance for such property for the taxable year for which the return is made, computed with or without regard to percentage depletion, and if the taxpayer fails to make such statement in the first return, the depletion allowance for such property for such years shall be computed without reference to percentage depletion.

Under this section it appears that you have failed to make an election in the original 1934 return, and cannot, therefore, be allowed to later claim depletion upon the percentage basis. The entire cost of your assets having been previously recovered by normal depletion allowances based on cost. no depletion can be allowed for the year 1934.

Percentage depletion was allowed for the year 1933, although not claimed on your original return for that year, since section 114(b)-4 of the Revenue Act of 1932 did not require the election for the year 1933, but did require that with [6] the return for 1933 an election for the years subsequent to 1933 be made.

Official notice of the disallowance of your claim will be issued by registered mail in accordance with section 1103 (a) of the Revenue Act of 1932.

In case you agree to the entire amount of the deficiencies please fill in the amounts of $453.50 and $164.91 on the enclosed form 870 (Waiver of Restrictions) and forward it, properly executed, to the Commissioner of Internal Revenue, Washington, D. C. However, if you do not acquiesce in all of the adjustments making up the deficiencies indicated, but would like to stop the accumulation of interest on that part of the deficiencies resulting from adjustments to which you agree, please fill out the form 870 inserting therein the amounts you desire to have assessed at once. In the event that you agree to only a part of the deficiencies indicated, the execution of the form for the agreed portion of the deficiencies will not deprive you of your right to petition the United States Board of Tax Appeals for a redetermination of the deficiencies for the year to which it relates.

MFS/ih-3 [7]

J. E. Riley Investment Company
Year ended December 31, 1934

Schedule 1

Adjustments to Net Income

Net income as disclosed by original return		$25,863.27
As corrected		30,161.49
Net adjustment as computed below		$ 4,298.22
Unallowable deductions and additional income:		
(a) Accrued interest	$3,554.78	
(b) Error in computation	1,000.00	
Total		4,554.78
Nontaxable income and additional deductions:		
(c) Territorial taxes	256.56	
Total		256.56
Net Adjustment as above		$ 4,298.22

Explanation of Items

(a) On each of the income tax returns for prior years in which a net income was reported you claimed a deduction for accrued interest. The exact nature of this item is not clearly stated but apparrently covers interest on some of the original obligations assumed by you upon incorporation, and subsequent loans. It does not appear that this accrued interest has ever been entered on your books.

For the year 1934 accrued interest was claimed on your return in the amount of $3,554.78. Your books are kept on a cash basis; this interest for 1934 was not paid during the year and from an examination of your income tax return this office holds

that you are in fact upon a cash basis. The evidence available is not considered sufficient to justify the allowance of accrued interest as claimed, even if it were held that you are on the accrual basis as claimed on your amended return.

(b) In deducting total deductions of $3,554.78 from total income of $30,418.05 on your original return, an error of [8] $1,000.00 was made. Correction of this error increases net income as reflected in such original return by $1,000.00.

(c) Territorial tax eliminated from deductions per books in the preparation of your return is an allowable deduction.

Schedule 2
Computation of Tax
Income Tax

Net income for taxable year	$30,161.49
Income tax at 13¾%	4,147.20
Income tax previously assessed:	
Account #406019	3,693.70
Deficiency of income tax	453.50
Net income for excess-profits tax computation	30,161.49
Less: 12½% of $50,000.00 value of capital stock as declared in your capital stock tax return for year ended June 30, 1934	6,250.00
Amount subject to excess-profits tax	23,911.49
Excess-profits tax 5% of $23,911.49	1,195.57
Excess-profits tax assessed:	
Original, account #400019	1,030.66
Deficiency of excess-profits tax	$ 164.91

HFS/1h-3

[Endorsed]: U. S. B. T. A. Filed Mar. 1, 1937.

[9]

[Title of Board and Cause.]

ANSWER

Comes now the Commissioner of Internal Revenue, by his attorney, Morrison Shafroth, Chief Counsel, Bureau of Internal Revenue, and for answer to the petition filed in the above-entitled proceeding, admits and denies as follows:

(1) Admits that the petitioner is a corporation organized and existing by virtue of the laws of the State of Nevada, with an office and place of business at Flat, Alaska.

(2) Admits the allegations contained in paragraph (2) of the petition.

(3) Admits that the taxes in controversy are income and excess-profits taxes for the year 1934. Denies the remaining allegations contained in paragraph (3) of the petition.

(4) Denies that error was committed as alleged in paragraph (4) of the petition.

(5) (a) For lack of information or belief sufficient to form an opinion as to the truth thereof, denies the allegations contained in subparagraph (a) of paragraph (5) of the petition.

(b) and (c) Admits the allegations contained in subparagraphs (b) and (c) of paragraph (5) of the petition. [10]

(d) For lack of information or belief sufficient to form an opinion as to the truth thereof, denies the allegations contained in subparagraph (d) of paragraph (5) of the petition.

(e) Admits that sometime in 1936 petitioner filed an amended return for 1934 with the Collector of Internal Revenue at Tacoma, Washington, upon which a deduction of percentage depletion was claimed in the amount of $13,600.57. Admits that a claim for refund was filed by petitioner, based on such claimed depletion deduction.

(f) Admits that upon audit of the return for 1934, the respondent determined a deficiency in taxes, based upon the disallowance of certain accrued interest and certain other adjustments, and refused to allow the claimed depletion deduction.

(g) Denies the allegations contained in subparagraph (g) of paragraph (5) of the petition.

Denies generally and specifically each and every allegation contained in the petition not hereinbefore specifically admitted, qualified, or denied.

Wherefore, it is prayed that the Board redetermine the correct amount of the deficiency involved in this proceeding to be equal to the amounts determined by the Commissioner, viz., $453.50 in income tax and $164.91 in excess-profits tax, a total of $618.41, for the year 1934.

(Signed) MORRISON SHAFROTH
Chief Counsel,
Bureau of Internal Revenue.

Of Counsel:
F. R. SHEARER,
B. M. BRODSKY,
Special Attorneys,
Bureau of Internal Revenue.

[Endorsed]: U. S. B. T. A. Filed April 28, 1937.

[Title of Board and Cause.]

AMENDED PETITION

The above-named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency (IT:E:7:8:HFS-90D) dated January 19, 1937, and as a basis of its proceeding, alleges as follows:

(1) The petitioner is a corporation organized and existing by virtue of the laws of the State of Nevada with its principal office and place of business at Flat, Alaska.

(2) The notice of deficiency, a copy of which is attached to the original petition, and made a part of this petition by reference, is dated January 19, 1937.

(3) The taxes in controversy are income and profits taxes for the year 1934 in the total amount of $4,216.62 of which $1618.41 is a deficiency asserted by the respondent and $2,598.21 represents an overpayment.

(4) The determination of tax set forth in the said notice of deficiency is based upon the following error [12]

The Commissioner erred in refusing to permit the petitioner to deduct statutory percentage depletion from income.

(5) The facts upon which the petitioner relies as the basis of this proceeding are as follows:

(a) The petitioner's mines and activities are conducted at Flat, Alaska, which is several hundred miles from the nearest city.

(b) In its income tax return for 1934, petitioner showed gross receipts from its gold mining operations, in the amount of $99,711.56.

(c) The said original return for 1934 did not deduct, or mention, depletion of any kind, either cost or percentage.

(d) During the year 1935, the officers of the petitioner were advised for the first time of the provisions of Section 114 (b)-4 of the Revenue Act of 1934, which permitted taxpayers engaged in metal mining to take a depletion deduction at the rate of 15% of the gross income from the property.

(e) As a result of the information referred to in the preceding paragraph, the petitioner, on or about February 8, 1936, mailed to the Collector of Internal Revenue at Tacoma, Washington, an amended return for 1934, upon which a deduction of percentage depletion was taken, in the amount of $13,600.57. The letter accompanying the amended [13] return requested a refund, based upon the depletion deduction referred to.

(f) Upon audit of the return for 1934, the respondent determined the deficiency in tax, based upon the disallowance of certain accrued interest, and refused to allow the depletion deduction.

(g) Petitioner contends that the said depletion deduction is proper.

Wherefore, the petitioner prays that this Board may hear the proceeding, and:

(a) Determine that petitioner is entitled to a deduction on account of percentage depletion.

(b) Grant such other and further relief as the Board may deem proper.

(s) ROBERT ASH
Munsey Building,
Washington, D.C.
Attorney for Petitioner.

Territory of Alaska—ss.

Sam'l Applebaum, being duly sworn, says that he is the President of the J. E. Riley Investment Company, above-named; that he is duly authorized to verify the foregoing petition; that he has read the said petition, or had the same read to him, and is familiar with the statements contained therein and the facts stated are true.

(s) SAM'L APPLEBAUM

Subscribed and sworn to before me this 1st day of April 1937.

(s) Y. M. GARLAND
United States Commissioner

[Endorsed]: U S.B.T.A. Lodged April 29, 1937. Filed May 3, 1937. [14]

[Title of Board and Cause.]

ANSWER TO AMENDED PETITION

Comes now the Commissioner of Internal Revenue, by his attorney, Morrison Shafroth, Chief Counsel, Bureau of Internal Revenue, and for answer to the amended petition filed in the above-entitled proceeding, admits and denies as follows:

(1) Admits that the petitioner is a corporation organized and existing by virtue of the laws of the State of Nevada, with an office and place of business at Flat, Alaska.

(2) Admits the allegations contained in paragraph (2) of the amended petition.

(3) Admits that the taxes in controversy are income and excess-profits taxes for the year 1934. Denies the remaining allegations contained in paragraph (3) of the amended petition.

(4) Denies that error was committed as alleged in paragraph (4) of the amended petition.

(5) (a) For lack of information or belief sufficient to form an opinion as to the truth thereof, denies the allegations contained in subparagraph (a) of paragraph (5) of the amended petition.

(b) and (c) Admits the allegations contained in subparagraphs (b) and (c) of paragraph (5) of the amended petition. [15]

(d) For lack of information or belief sufficient to form an opinion as to the truth thereof, denies the allegations contained in subparagraph (d) of paragraph (5) of the amended petition.

(e) Admits that sometime in 1936 petitioner filed an amended return for 1934 with the Collector of Internal Revenue at Tacoma, Washington, upon which a deduction of percentage depletion was claimed in the amount of $13,600.57. Admits that a claim for refund was filed by petitioner, based on such claimed depletion deduction.

(f) Admits that upon audit of the return for 1934, the respondent determined a deficiency in taxes, based upon the disallowance of certain accrued interest and certain other adjustments, and refused to allow the claimed depletion deduction.

(g) Denies the allegations contained in subparagraph (g) of paragraph (5) of the amended petition.

Denies generally and specifically each and every allegation contained in the petition not hereinbefore specifically admitted, qualified, or denied.

Wherefore, it is prayed that the Board redetermine the correct amount of the deficiency involved in this proceeding to be equal to the amounts determined by the Commissioner, viz., $453.50 in income tax and $164.91 in excess-profits tax, a total of $618.41, for the year 1934.

(Signed) MORRISON SHAFROTH
Chief Counsel,
Bureau of Internal Revenue.

Of Counsel:
F. R. SHEARER,
B. M. BRODSKY,
Special Attorneys,
Bureau of Internal Revenue. [16]

[Title of Board and Cause.]

Robert Ash, Esq., for the petitioner.
F. B. Schlosser, Esq., for the respondent.

MEMORANDUM FINDINGS OF FACT AND OPINION.

Leech: This is a proceeding to redetermine deficiencies in income and excess-profits taxes of $453.50 and $164.91, respectively, for the calendar year 1934. Petitioner also claims it overpaid its taxes for that year in the amount of $2,598.21. The only issue submitted relates entirely to the validity of this claim, the deficiencies having resulted from matters not here in controversy. The question for decision is whether petitioner is entitled to percentage depletion under section 114(b)(4) of the Revenue Act of 1934, despite the fact that it failed to claim it in its first return under that Act because of ignorance of the law. [17]

FINDINGS OF FACT.

Petitioner is a corporation organized under the laws of Nevada, with its principal office and place of business at Flat, Alaska. Its business is the mining of gold.

Flat is located in a remote part of Alaska on the 62nd parallel of latitude and the 158th meridian

of longitude. During the season of navigation, the usual means of travel to Flat from Seward, the seaport, is from Seward, by railroad, to Nenana on the Yukon River, a distance of 415 miles, then by water via the Yukon River to Holy Cross, a distance of over 700 miles, and thence via a tributary of the Yukon to Flat, a distance of 420 miles. When navigation is not open, travel to and from Flat is either by plane or on foot. It requires about two weeks to go over the 400-mile trail on foot from Flat to Anchorage, which is the nearest town.

The uncertainty and slowness of the winter mail service invariably resulted in current tax return forms reaching Flat too late for timely execution and filing. In order to avoid delinquency, it was the custom of petitioner's officers to use old return forms; consequently petitioner's original return for 1934 was filed on a 1933 form which had been mailed to petitioner by the Collector of Internal Revenue at Tacoma, Washington. In the winter of 1934, mail came to Flat part way by plane and part way by dog team. In order to be sure of filing the 1934 return on time, an officer of petitioner executed it on January 2, 1935, using the 1933 form, as stated. It reached Tacoma on January 29, but mail from Flat sometimes took two months in arriving at Tacoma. [18]

When petitioner's first 1934 return was filled out, its officers did not know of the statutory provisions allowing percentage depletion, but did know

that unless the law had been changed, petitioner was not entitled to depletion, as it had no basis for cost depletion. The Collector, in sending the forms, had not advised the petitioner with respect to statutory depletion, and all the knowledge then available to it on this score was contained in Instruction No. 23 attached to the 1933 form, which reads as follows:

> 23. Depletion.—If a deduction is claimed on account of depletion, secure from the collector Form D (minerals), Form E (coal), Form F (miscellaneous non-metals), Form O (oil and gas), or Form T (timber), fill in and file with return. If complete valuation data have been filed with Questionnaire in previous years, then file with this return information necessary to bring your depletion schedule up to date, setting forth in full statement of all transactions bearing on deductions or additions to value of physical assets with explanation of how depletion deduction for the taxable year has been determined. See Sections 23 (1) and 114 of the Revenue Act of 1932.

Petitioner's officer read the instructions before executing the return for 1934.

Petitioner's officers first actually learned of the statutory depletion provisions in August, 1935, when a revenue agent visited Flat and advised that petitioner was entitled to percentage depletion for both 1933 and 1934. This agent prepared reports to that

effect, as a result of which a refund was paid for 1933, but not for 1934; as to the latter year, the respondent ruled that petitioner had failed to claim percentage depletion in its original return and hence was not entitled to claim it subsequently. [19]

If petitioner's officers had known of the 1934 statutory provisions, they would have elected to take percentage depletion.

As soon as petitioner's officers were advised that percentage depletion had been disallowed, they filed both an amended return claiming such depletion in the amount of $13,600.57, and a claim for refund.

Petitioner's gross receipts from gold mining for the year 1934 were $99,711.56, and it has paid a tax for that year in the amount of $4,684.

OPINION

It is inferable from the record that the officers of petitioner were ignorant both of the 1932 and 1934 Revenue Acts with regard to percentage depletion. The 1932 Act,[1] in substance, provided that the elec-

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(1) Section 114. Basis for Depreciation and Depletion.

* * * * * * *

(b) Basis for Depletion.—

* * * * * * *

(4) Percentage Depletion for Coal and Metal Mines and Sulphur.—The allowance for depletion shall be, in the case of coal mines, 5 per centum, in the case of metal mines, 15 per centum, and, in the case of sulphur mines or deposits, 23 per centum, of the gross income from the property during the

tion must [20] be made by the taxpayer in its return for 1933 as to whether the depletion deduction for taxable years subsequent to 1933 should be made with or without reference to percentage depletion.

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taxable year, excluding from such gross income an amount equal to any rents or royalties paid or incurred by the taxpayer in respect of the property. Such allowance shall not exceed 50 per centum of the net income of the taxpayer (computed without allowance for depletion) from the property, except that in no case shall the depletion allowance for the taxable year 1932 or 1933 be less than it would be if computed without reference to this paragraph. A taxpayer making return for the taxable year 1933 shall state in such return, as to each property (or, if he first makes return in respect of a property for any taxable year after the taxable year 1933, then in such first return), whether he elects to have the depletion allowance for such property for succeeding taxable years computed with or without reference to percentage depletion. The depletion allowance in respect of such property for all succeeding taxable years shall be computed according to the election thus made. If the taxpayer fails to make such statement in the return, the depletion allowance for such property for succeeding taxable years shall be computed without reference to percentage depletion. During the period for which property acquired after December 31, 1933, is held by the taxpayer—

(A) if the basis of the property in the hands of the taxpayer is, under section 113 (a), determined by reference to the basis in the hands of the transferor, donor, or grantor, then the depletion allowance in respect of the property shall be computed with or without reference to percentage depletion, according to the method of computation which would have been appli-

In other words, the taxpayer had to decide, at the time it filed his return for 1933, whether it would, as to years beginning with 1934, compute depletion on the percentage basis or on the adjusted basis, as provided by section 113 (b). Report, Senate Finance Committee, 72d Cong., 1st sess., S. Report 665, p. 30. The 1934 Act,[2] however, allowed the taxpayer a new

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cable if the transferor, donor, or grantor had continued to hold the property, or

(B) if the basis of the property is, under section 113 (a), determined by reference to the basis of other property previously held by the taxpayer, then the depletion allowance in respect of the property shall be computed with or without reference to percentage depletion, according to the method of computation which would have been applicable in respect of the property previously held if the taxpayer had continued to hold such property.

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(2) Sec. 114. Basis for Depreciation and Depletion.

* * * * * * *

(b) Basis for depletion.—

* * * * * * *

(4) Percentage Depletion for Coal and Metal Mines and Sulphur.—The allowance for depletion under section 23 (m) shall be, in the case of coal mines, 5 per centum, in the case of metal mines, 15 per centum, and, in the case of sulphur mines or deposits, 23 per centum, of the gross income from the property during the taxable year, excluding from such gross income an amount equal to any rents or royalties paid or incurred by the taxpayer in respect of the property. Such allowance shall not exceed 50 per centum of the net income of the taxpayer (computed without allowance for depletion) from the property. A taxpayer making his

election in this regard, to be [21] made in the first return it should file for that year and to be followed in returns for all taxable years thereafter. This election also was to be as between percentage depletion and depletion otherwise computed, "otherwise" meaning with reference to the adjusted basis provided by section 113 (b). Report, Conference Committee, 73rd Congress, 2d Sess., H. Rept. 704, p. 29.

Had petitioner's officers known of the election provided by the 1934 Act, they would have exercised it. Since petitioner had no basis for cost depletion, their "election", in the premises, would really have been as between claiming a deduction and not claiming it, for if they did not deduct by a use of the

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first return under this title in respect of a property shall state whether he elects to have the depletion allowance for such property for the taxable year for which the return is made computed with or without regard to percentage depletion, and the depletion allowance in respect of such property for such year shall be computed according to the election thus made. If the taxpayer fails to make such statement in the return, the depletion allowance for such property for such year shall be computed without reference to percentage depletion. The method, determined as above, of computing the depletion allowance shall be applied in the case of the property for all taxable years in which it is in the hands of such taxpayer, or of any other person if the basis of the property (for determining gain) in his hands is, under section 113, determined by reference to the basis in the hands of such taxpayer, either directly or through one or more substituted bases, as defined in that section.

percentage method, they could not deduct at all. Not knowing of his statutory right, their collective feeling at the time they executed the 1934 return was that they were not entitled to depletion of any kind. [22]

Substantially the same question as is here presented was before the Board in Dorothy Glenn Coal Mining Co., 38 B.T.A. 1154, and C. H. Mead Coal Co., 38 B.T.A. 1163, (on appeal CCA 4). Acting under misapprehension of the law, the respective taxpayers had failed to claim percentage depletion in their first returns under the 1934 Act, and we held that they were thereafter precluded from taking deductions for depletion computed on that basis, because they had failed to comply with the statutory condition precedent to an allowance thereof, namely: the inclusion of a statement in their original returns that they chose to compute depletion by the percentage method.

The only factual difference between the Glenn and Mead cases, on one hand, and the instant proceedings on the other, is that here the failure to claim percentage depletion arose out of ignorance of the law rather than misconstruction of the law. But that difference does not affect the result.

Taxpayers pleaded ignorance of the laws giving them rights of election, without success, in Pacific National Co. v. Welch, 304 U. S. 191; Sylvia S. Strauss, 33 B.T.A. 855; affd., per curiam, 87 Fed. (2d) 1018; Smith Paper Co., 31 B.T.A. 28; affd.,

(Export Leaf Tobacco Co. v. Commissioner), 78 Fed. (2d) 163; cert. denied, 296 U. S. 627; Alameda Investment Co. v. McLaughlin, 33 Fed. (2d) 120; Buttolph v. Commissioner, 29 Fed. (2d) 695; John D. Biggers, 39 B.T.A. ——; Liberty Realty Corp., 26 B.T.A. 1119.

Petitioner relies chiefly on Morrow, Becker & Ewing Co., Inc., v. Commissioner, 57 Fed. (2d) 1, and Connor v. United States, 19 Fed. Supp. 97, (no appeal by government), neither of which cases, we think, aids it here. [23]

Whether the plea of ignorance of the law can ever be successful, we do not now decide. It is sufficient to say that this plea was accepted in the first case cited because only a very short period had elapsed between the passage of the effective law and the date when the taxpayer had to elect thereunder the method of reporting proceeds from sales of realty. However, here, the Revenue Act of 1934, fixing the tax liability, was in effect May 10, 1934, almost a year before petitioner's return for that year was due, and almost 8 months before it was executed by petitioner. The 1932 Act, providing for an election in the 1933 return, was passed June 6, 1932. Not only that, but the instructions attached to the 1933 return, which petitioner's officer had before him when he executed the return for 1934, although they did not set out its provisions, referred to section 114 of the 1932 Act, which first authorized an election of percentage depletion. In

the Connor case, last cited, when the taxpayer filed his return, he took no credit for Canadian taxes under the option granted by section 131 of the Revenue Act of 1932, because he did not know and had no reason to suspect a Canadian tax was due. The court, holding that the statute should not be construed to require the impossible, allowed a claim for refund, based on an amended return filed after the Canadian tax had been paid. However, there is no indication in the statutory provision there applicable that time is of the essence in making that election, while there is such an express condition in section 114 (b) (4), controlling here.

The equities in this case favor the petitioner because it has lost its right to percentage depletion, not only for 1934, but all subsequent years, because it has no basis for cost depletion and has failed to claim [24] percentage depletion in its original 1934 return. However, this Board is powerless to mitigate this apparent hardship. Northport Shores, Inc., 31 B.T.A. 1013; John D. Biggers, supra. The taxpayer should seek its relief from Congress.

Decision will be entered for the respondent.

Entered May 10, 1939. [25]

United States Board of Tax Appeals
Washington

Docket No. 88273

J. E. RILEY INVESTMENT COMPANY,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DECISION

Pursuant to the determination of the Board, as set forth in its Memorandum Findings of Fact and Opinion entered May 10, 1939, it is

Ordered and decided: That there are deficiencies in income and excess profits taxes in the respective amounts of $453.50 and $164.91 for the calendar year 1934.

[Seal] (s) J. RUSSELL LEECH,
Member.

Entered May 11, 1939. [26]

[Title of Board and Cause.]

PETITION FOR REVIEW
and
ASSIGNMENT OF ERROR

To the Honorable Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

Now comes J. E. Riley Investment Company, by its attorney, Robert Ash, and respectfully shows:

I
Jurisdiction

The petitioner on review (hereinafter referred to as the taxpayer) is a corporation with its principal office and place of business in Flat, Alaska. Its income tax return for the year 1934 was filed with the Collector of Internal Revenue for the District of Washington at Tacoma, Washington, and within the judicial circuit of the United States Circuit Court of Appeals for the Ninth Circuit. [27]

The respondent on review (hereinafter referred to as the Commissioner) is the duly appointed, qualified and acting Commissioner of Internal Revenue of the United States, holding his office by virtue of the laws of the United States.

The taxpayer files this petition pursuant to the provisions of Sections 1001, 1002 and 1003 of the Revenue Act of 1926, as amended by Section 603 of the Revenue Act of 1928, as amended by Section 1101 of the Revenue Act of 1932, as amended by Section 519 of the Revenue Act of 1934.

II
Prior Proceedings

On January 19, 1937, the Commissioner determined a deficiency in income and excess profits taxes against the taxpayer for the year 1934 in the amounts of $453.50 and $164.91, respectively, a total of $618.41, and sent by registered mail a no-

tice of said deficiencies in accordance with the provisions of Section 272 of the Revenue Act of 1934. Thereafter, and on March 1, 1937, the taxpayer filed an appeal from the said determination of the Commissioner with the United States Board of Tax Appeals.

The case was tried before the United States Board of Tax Appeals on March 2, 1939.

On May 10, 1939, the Board promulgated its Memorandum [28] Findings of Fact and Opinion, and on May 11, 1939, entered its decision, wherein it was ordered and decided that there are deficiencies in income and excess profits taxes in the respective amounts of $453.50 and $164.91, for the calendar year 1934.

III

Nature of Controversy

The question presented is whether the taxpayer, a gold mining corporation, is entitled to percentage depletion under Section 114 (b) (4) of the Revenue Act of 1934, or if it is to be denied depletion for 1934 and all succeeding years, because, on account of its isolated location in the interior of Alaska, it had no knowledge of the enactment of the provision allowing percentage depletion and, therefore, could not and did not "elect" to take the percentage depletion allowance in its original 1934 return, although such allowance was claimed in an amended return.

The Board found the facts as follows:

"Petitioner is a corporation organized under the laws of Nevada, with its principal office and place of business at Flat, Alaska. Its business is the mining of gold.

"Flat is located in a remote part of Alaska on the 62nd parallel of latitude and the 158th meridian of longitude. [29] During the season of navigation, the usual means of travel to Flat from Seward, the seaport, is from Seward, by railroad, to Nenana on the Yukon River, a distance of 415 miles, then by water via the Yukon River to Holy Cross, a distance of over 700 miles, and thence via a tributary of the Yukon to Flat, a distance of 420 miles. When navigation is not open, travel to and from Flat is either by plane or on foot. It requires about two weeks to go over the 400-mile trail on foot from Flat to Anchorage, which is the nearest town.

"The uncertainty and slowness of the winter mail service invariably resulted in current tax return forms reaching Flat too late for timely execution and filing. In order to avoid delinquency, it was the custom of petitioner's officers to use old return forms; consequently petitioner's original return for 1934 was filed on a 1933 form which had been mailed to petitioner by the Collector of Internal Revenue at Tacoma, Washington. In the winter of 1934, mail came to Flat part way by plane and part way by dog team. In order to be sure of filing the 1934 return on time, an officer of

petitioner executed it on January 2, 1935, using the 1933 form, as stated. It reached Tacoma on January 29, but mail from Flat sometimes took two months in arriving at Tacoma. [30]

"When petitioner's first 1934 return was filled out, its officers did not know of the statutory provisions allowing percentage depletion, but did know that unless the law had been changed, petitioner was not entitled to depletion, as it had no basis for cost depletion. The Collector, in sending the forms, had not advised the petitioner with respect to statutory depletion, and all the knowledge then available to it on this score was contained in Instruction No. 23 attached to the 1933 form, which reads as follows:

> "23. Depletion.—If a deduction is claimed on account of depletion, secure from the collector Form D (minerals), Form E (coal), Form F (miscellaneous non-metals), Form O (oil and gas), or Form T (timber) fill in and file with return. If complete valuation data have been filed with Questionnaire in previous years, then file with this return information necessary to bring your depletion schedule up to date, setting forth in full statement of all transactions bearing on deductions or additions to value of physical assets with explanation of how depletion deduction for the taxable year has been determined. See Sections 23 (1) and 114 of the Revenue Act of 1932.

"Petitioner's officer read the instructions before executing the return for 1934.

"Petitioner's officers first actually learned of the statutory depletion provisions in August, 1935, when a revenue agent visited Flat and advised that petitioner was entitled to percentage depletion for both 1933 and 1934. This agent prepared reports to that effect, as a result of [31] which a refund was paid for 1933, but not for 1934; as to the latter year, the respondent ruled that petitioner had failed to claim percentage depletion in its original return and hence was not entitled to claim it subsequently.

"If petitioner's officers had known of the 1934 statutory provisions, they would have elected to take percentage depletion.

"As soon as petitioner's officers were advised that percentage depletion had been disallowed, they filed both an amended return claiming such depletion in the amount of $13,600.57, and a claim for refund.

"Petitioner's gross receipts from gold mining for the year 1934 were $99,711.55 and it has paid a tax for that year in the amount of $4,684."

In its opinion, the Board states:

"Had petitioner's officers known of the election provided by the 1934 Act, they would have exercised it. Since petitioner had no basis for cost depletion, their "election", in the premises, would really have been as between claiming a deduction and not claiming it, for if they did not deduct by a use of

the percentage method, they could not deduct at all. Not knowing of this statutory right, their collective feeling at the time they executed the 1934 return was that they were not entitled to depletion [32] of any kind."

IV

ASSIGNMENTS OF ERROR

The taxpayer, as a basis of review, makes the following assignments of error:

1. The Board of Tax Appeals erred in holding that the taxpayer was not entitled to depletion under Section 114 (b) (4) of the Revenue Act of 1934.

2. The Board of Tax Appeals erred in failing to hold that the claiming of percentage depletion in its amended return for 1934 complied with the provisions of Section 114 (b) (4) of the Revenue Act of 1934 and entitled the taxpayer to percentage depletion.

3. The Board of Tax Appeals erred in deciding for the Commissioner.

Wherefore, the taxpayer petitions that the decision of the Board of Tax Appeals be reviewed by the United States Circuit Court of Appeals for the Ninth Circuit and that appropriate action be taken to the end that the errors complained of may be reviewed and corrected by said Court.

(s) ROBERT ASH,
941 Munsey Building,
Washington, D. C.
Attorney for Petitioner. [33]

District of Columbia—ss.

Robert Ash, being duly sworn, states that he is the attorney for the petitioner above named; that he knows of the contents of the foregoing petition; that to the best of his knowledge and belief the statements contained therein are true, and that the assignments of error are well taken.

ROBERT ASH.

Subscribed and sworn to before me this 15th day of June, 1939.

[Seal] CATHERINE F. DOLAN,
Notary Public.

My comm. exp. 2/15/44.

[Endorsed]: U.S.B.T.A. Filed June 15, 1939.

[34]

[Title of Board and Cause.]

PRAECIPE FOR THE RECORD

To the Clerk of the United States Board of Tax Appeals:

Will you please prepare and transmit to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit certified copies of the following documents in the above entitled case:

(1) Docket entries of proceedings before the United States Board of Tax Appeals.

(2) Pleadings before the Board of Tax Appeals.

(3) Memorandum Findings of Fact and Opinion entered May 10, 1939.

(4) Decision of Board of Tax Appeals entered May 11, 1939, determining deficiencies in income and excess profits tax for the calendar year 1934.

(5) Petition for review.

(6) This praecipe for the record. [35]

The foregoing are to be prepared, certified, and transmitted as required by law and the rules of the United States Circuit Court of Appeals for the Fifth Circuit.

(s) ROBERT ASH,
Munsey Building,
Washington, D. C.
Attorney for Petitioner.

Service of a copy of the foregoing is acknowledged this 15th day of June, 1939.

J. P. WENCHEL,
Chief Counsel,
Bureau of Internal Revenue,
Attorney for the Respondent.

[Endorsed]: U.S.B.T.A. Filed June 15, 1939. [36]

[Title of Board of Cause.]

CERTIFICATE

I, B. D. Gamble, Clerk of the U. S. Board of Tax Appeals, do hereby certify that the foregoing pages, 1 to 36, inclusive, contain and are a true copy of

the transcript of record, papers, and proceedings on file and of record in my office as called for by the Praecipe in the appeal (or appeals) as above numbered and entitled.

In testimony whereof, I hereunto set my hand and affix the seal of the United States Board of Tax Appeals, at Washington, in the District of Columbia, this 29th day of June, 1939.

[Seal] B. D. GAMBLE,
Clerk, United States Board of Tax Appeals.

[Endorsed]: No. 9234. United States Circuit Court of Appeals for the Ninth Circuit. J. E. Riley Investment Company, Petitioner, vs. Commissioner of Internal Revenue, Respondent. Transcript of the Record. Upon Petition to Review a Decision of the United States Board of Tax Appeals.

Filed July 10, 1939.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

United States Circuit Court of Appeals for the Ninth Circuit

No. 9234

J. E. RILEY INVESTMENT COMPANY,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DESIGNATION OF RECORD

To the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit:

In accordance with Rule 19, subparagraph 6, of the rules of practice of your Court, will you please print the entire record in the above-entitled cause, as transmitted to you by the Clerk of the United States Board of Tax Appeals.

ROBERT ASH,
941 Munsey Building,
Washington, D. C.
Attorney for Petitioner.

Service of a copy of the foregoing is acknowledged this 15th day of July, 1939.

J. P. WENCHEL,
Chief Counsel,
Bureau of Internal Revenue,
Washington, D. C.
Attorney for the Respondent.

[Endorsed]: Filed July 19, 1939. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

PETITIONER'S STATEMENT OF POINTS TO BE RELIED UPON

In accordance with Rule 19, paragraph 6, petitioner submits the following statement of points on which it intends to rely.

I

"Election" is dependent upon the opportunity to choose between two or more conflicting courses and, in the absence of such opportunity to choose, there can be no "election".

II

Petitioner had no opportunity to "elect" to take percentage depletion in its 1934 return so should not be denied such depletion.

III

There is no statutory provision for amended tax returns, but they are recognized by the Treasury and have been uniformly construed as being amendments or supplements to the original return.

IV

An "election" made upon an amended tax return is a valid "election" under the statute here involved and entitles petitioner to percentage depletion.

V

The Congressional intent was to allow depletion to metal miners and to liberalize the depletion provisions of the statute. The remedial statute should be construed to carry out its purposes and not, as the Board of Tax Appeals construed it in this case, to entirely deny a depletion deduction and thus defeat the purposes of the statute.

ROBERT ASH,
Munsey Building,
Washington, D. C.
Attorney for Petitioner.

Service of a copy of the foregoing is acknowledged this 3rd day of August, 1939.

J. P. WENCHEL,
Chief Counsel,
Bureau of Internal Revenue,
Attorney for Respondent.

[Endorsed]: Filed Aug. 7, 1939. Paul P. O'Brien, Clerk.

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No. 9234

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

J. E. RILEY INVESTMENT COMPANY,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Upon Petition to Review a Decision of the United States Board of Tax Appeals.

PROCEEDINGS HAD IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

PARKER PRINTING COMPANY, 545 SANSOME STREET, SAN FRANCISCO

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United States Circuit Court of Appeals
for the Ninth Circuit

Excerpt from Proceedings of Thursday, November 30, 1939.

Before: Denman, Mathews and Healy, Circuit Judges.

[Title of Cause.]

ORDER OF SUBMISSION

Ordered petition to review in above cause argued by Mr. Robert Ash, counsel for petitioner, and by Mr. Ellis Slack, Special Assistant to the Attorney General, counsel for respondent, and submitted to the court for consideration and decision.

United States Circuit Court of Appeals
for the Ninth Circuit

Excerpt from Proceedings of Tuesday, December 26, 1939.

Before: Denman, Mathews and Healy, Circuit Judges.

[Title of Cause.]

ORDER DIRECTING FILING OF OPINION AND FILING AND RECORDING OF JUDGMENT.

By direction of the Court, Ordered that the type-

written opinion* this day rendered by this court in above cause be forthwith filed by the clerk, and that a judgment be filed and recorded in the minutes of this court in accordance with the opinion rendered.

[*Clerk's note: Opinion withdrawn pursuant to opinion and order filed March 16, 1940.]

United States Circuit Court of Appeals
for the Ninth Circuit

No. 9234

J. E. RILEY INVESTMENT COMPANY,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

JUDGMENT

Upon petition to Review a Decision of the United States Board of Tax Appeals.

This Cause came on to be heard on the Transcript of the Record from the United States Board of Tax Appeals and was duly submitted.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the Decision of the said Board of Tax Appeals in this Cause be, and hereby is affirmed.

[Endorsed]: Filed and entered Dec. 26, 1939. Paul P. O'Brien, Clerk.

United States Circuit Court of Appeals
for the Ninth Circuit

Excerpt from Proceedings of Saturday, March 16, 1940.

Before: Denman, Mathews and Healy, Circuit Judges.

[Title of Cause.]

ORDER DIRECTING FILING OF OPINION AND DISSENTING OPINION, AND WITHDRAWING OF OPINION OF DEC. 26, 1939, AND DENYING PETITION FOR REHEARING.

By direction of the Court, Ordered that the typewritten opinion and dissenting opinion this day rendered in this cause be forthwith filed by the clerk.

Pursuant to said majority opinion, It Is Ordered that the opinion of this court heretofore rendered and filed on December 26, 1939 be, and hereby is withdrawn, and the opinion this day filed is substituted therefor.

It Is Further Ordered that the petition of taxpayer, filed January 6, 1940, and within time allowed therefor by rule of court, for a rehearing of above cause be, and hereby is denied.

[Title of Circuit Court of Appeals and Cause.]

On Petition for Review of Decision of the United States Board of Tax Appeals

OPINION

Before: Denman, Mathews and Healy, Circuit Judges.

Healy, Circuit Judge.

The case is here on petition to review a decision of the Board of Tax Appeals. It involves the construction of a provision of §114 (b) (4) of the Revenue Act of 1934.

That act (§23 (m)) provides that in computing net income there shall be allowed as deductions in the case of mines and other natural deposits a reasonable allowance for depletion, according to the peculiar conditions in each case. §114 (b) (4) allows a depletion of 15% in the case of metal mines, subject to the condition that the taxpayer shall state in his first return under the act that he desires depletion computed on that basis. The statute is shown on the margin.[1]

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[1] "Percentage Depletion for Coal and Metal Mines and Sulphur.—The allowance for depletion under section 23 (m) shall be, in the case of coal mines, 5 per centum, in the case of metal mines, 15 per centum, and, in the case of sulphur mines or deposits, 23 per centum, of the gross income from the property during the taxable year, * * . Such allowance shall not exceed 50 per centum of the net income of the taxpayer (computed without allowance for depletion) from the property. A taxpayer mak-

In its income tax return for 1934 petitioner, whose business is the mining of gold, made no statement of its election in respect of depletion allowance. The return was made out and filed in January, 1935. On March 3, 1936 petitioner filed an amended return claiming percentage depletion, and also claimed a refund.

Petitioner is a Nevada corporation with its principal office and place of business at Flat, Alaska. Flat is in a remote part of the territory, and conditions of travel are such that it takes weeks for mail originating at that place to reach Tacoma. The slowness of the winter service invariably resulted in current tax return forms reaching Flat too late for timely execution and filing. In order to avoid delinquency, it was the custom of petitioner's officers to use old return forms; consequently taxpayer's original return for 1934 was filed on a 1933 form which had been mailed it by the Collector at Tacoma.

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ing his first return under this title in respect of a property shall state whether he elects to have the depletion allowance for such property for the taxable year for which the return is made computed with or without regard to percentage depletion, and the depletion allowance in respect of such property for such year shall be computed according to the election thus made. If the taxpayer fails to make such statement in the return, the depletion allowance for such property for such year shall be computed without reference to percentage depletion. The method, determined as above, of computing the depletion allowance shall be applied in the case of the property for all taxable years in which it is in the hands of such taxpayer. * *."

When petitioner's return for 1934 was filled out its officers did not know of the statutory provision allowing percentage depletion, but did know that, unless the law had been changed, petitioner was not entitled to depletion, as it had no basis for cost depletion. The Collector, in sending the forms, had not advised petitioner with respect to statutory depletion. Petitioner first actually learned of the provision in August, 1935, when it was advised by a revenue agent that it was entitled to percentage depletion for both 1933 and 1934. The agent prepared reports to that effect, as a result of which a refund was paid for 1933, but not for 1934.[2] The Commissioner ruled that, as to the latter year, the taxpayer had failed to claim percentage depletion in its original return and hence was not entitled to claim it thereafter.

Had taxpayer's officers known of the 1934 stat-

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[2]H. Rep. No. 704, 73d Cong., 2d Sess., states: "Section 114 (b) (4). Percentage depletion for coal and metal mines and sulphur: Under the Revenue Act of 1932, percentage depletion was first allowed in the case of coal, metal, and sulphur mines. That act required the taxpayer to make in his 1933 return an election, binding for 1934 and subsequent years, as to whether the depletion deduction in such cases was to be computed upon a percentage basis. To avoid administrative complexity, your committee is of the opinion that the taxpayer making his first return under the bill should be entitled to a new election as to whether he will compute his allowance for depletion in the case of coal, metal, and sulphur mines upon the percentage basis. This section of the bill so provides."

utory provision, they would have elected to take percentage depletion. As soon as they were advised that percentage depletion had been disallowed, they filed an amended return and a claim for refund as above stated. The taxpayer's gross receipts from gold mining for the year 1934 were $99,711.56 and it has paid a tax for that year in the amount of $4,684.00.

On petition for redetermination, the Board of Tax Appeals upheld the Commissioner's ruling denying percentage depletion.

Petitioner argues that amended returns, while not provided for by law, are recognized and have been uniformly construed as being amendments or supplements to the original return. Hence, it is said, the "first" return means an amended first return; so, an election made in an amended first return is an election made in a "first" return.

In the Fourth Circuit, in C. H. Mead Coal Co. v. Commissioner, 106 F. (2d) 388, the court reached a similar conclusion, holding that in using the words "first return" Congress intended to include a first return as properly amended. Any other construction, the court thought, would, in fairness to the taxpayer, be too narrow. Provided the amendment is timely, and is made in good faith in order to correct a mistake, a first return was held to be no less such because amended. By the phrase "timely amendment" we understand that the court meant an amended return made by the taxpayer,

as in that case, "immediately upon learning of its mistake, and before the time for filing its return for the next succeeding year." The holding appears to confuse the statutory requirement with the supposed authority or duty of the Commissioner to relieve against mistakes.

The act applies only to taxable years beginning after December 31, 1933 (§1). Here the taxpayer reported its income on the basis of the calendar year, so that the first return filed by it under the act was the return for the calendar year 1934. By first return, we think, Congress had reference to the return contemplated by §53 of the act, that is, to the return required to be filed on or before the 15th day of March following the close of the calendar year, or within such extended time, not exceeding six months, as has been granted by the Commissioner under §53 (a) (2).

This interpretation is in harmony with Haggar Co. v. Helvering, . . . U. S. . . . (Jan. 2, 1940). That case involved the construction of the phrase "first return" as used in the capital stock tax provision of the 1934 act. The court there held that an amended return, filed during the extended time allowed by the Commissioner for filing the first return under the act, was a timely return and should have been accepted. It pointed out that "it has long been the practice of the Department, in the cases of other types of tax to accept an amended return, filed within the period allowed for filing returns, as the return of the taxpayer for the taxable year."

Had the taxpayer, in the case before us, made its election by amendment within the time allowed by the act for filing returns, or within an added period granted for filing its return, a substantial compliance with the requirements of the act would have resulted. It would seem, indeed, that the taxpayer may make a substituted return of that sort as a matter of right. But petitioner sought to make its election by amending long after the expiration of the statutory period, and it had obtained no extension.

The statute provides that the method of computation elected by the taxpayer, or the method of computing depletion without regard to percentage where the taxpayer indicates no election, shall be applied in the case of the property for all future years. If the view broadly stated by petitioner is correct, an ordinary amended return electing to take depletion allowance on a percentage basis may well throw into confusion the computation of the taxpayer's depletion for ensuing taxable years. However, petitioner suggests a narrower view, in line with Mead Coal Co. v. Commissioner, supra, that the amended return must perhaps be filed before the expiration of the time allowed for making a return for the ensuing year. But if it be assumed that Congress intended to permit an election by amendment after the lapse of the statutory time for making returns, it failed to provide any time limitation of the sort suggested. Not only is there no

such limitation set out in the act, there is, so far as we are aware, no regulation or practice requiring that amended returns, where permitted, be filed "promptly", or within a "reasonable" time, or before the filing of the return for the next year.[3]

Should we adopt a time limitation of this sort, we must perforce embark on waters not charted by Congress or mapped by familiar bureau regulation —an excursion into the legislative domain not open to the courts. If by a first return Congress meant a return as it may be amended in line with the practice heretofore prevailing in cases of other types of tax, it would follow that where a taxpayer inadvertently omits to state his election in a return filed within the statutory period, he may, conformably to the intent of Congress, supply the omission at any time within the three-year period prescribed by §322 for claiming refunds. This construction substantially nullifies other and mandatory provisions of the statute.

The situation is not the ordinary one of the use of an amended return to correct errors and miscalculations. Rather, it is an attempt, by the filing of an amended return, to adopt a method of computation at variance with that which the statute

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[3]Art. 43-2 of Regulations 86, which permits the filing of an amended return for the purpose of deducting a loss occurring during a prior taxable year but not then ascertained, indicates that such a return may be filed at any time within the period allowed for claiming a refund.

itself irrevocably imprints on the statutory return in those cases where the taxpayer has failed to indicate an election.

In Pacific National Co. v. Welch, 304 U. S. 191,[4] it was pointed out that in the case of overpayment the taxpayer is entitled to a refund calculated according to the method on which the return was based; but that a change from one method to another requires recomputations and readjustments of tax liability for subsequent years and imposes burdensome uncertainties upon the administration of the revenue laws; further, that "it would operate to enlarge the statutory period for filing returns to include the period for the recovery of overpayments." In that case the amended return was filed in an attempt to correct a mistake arising out of the taxpayer's ignorance of his rights under the law. See 95 F. (2d) 590, 592. The right to amend the return was denied.

It is argued that since appellant had exhausted its basis for cost depletion, and was aware of that fact, it had no real election to make—that its choice was either to take percentage depletion or none at all. However, considerations having to do with the general theory of election have little place in the discussion, since we are dealing with a statute pre-

[4]For other cases following the same rule, see Rose v. Grant, 5 Cir., 39 F. (2d) 340; Alameda Inv. Co. v. McLaughlin, 9 Cir., 33 F. (2d) 120; Radiant Glass Co. v. Burnet, Ct. of App. Dist. Col., 54 F. (2d) 718.

scribing more or less arbitrary rules. The act provides in general terms for the computation of depletion allowance in all cases of mines where deductions on account of depletion are claimed, not merely for those instances in which the taxpayer may have a choice between alternative methods. It was proper to require the taxpayer, even though he has no basis for cost depletion, to state in his first return under the act whether he elects to have depletion allowance computed on the percentage basis. The taking of the deduction was a privilege granted the taxpayer; and in order to avail himself of it he must meet the terms on which the offer was held out. It was within the power of Congress to impose the mandatory alternative that the depletion allowance "shall" be computed for the current and future tax years without reference to percentage, if the taxpayer fails to make such statement in his first return.

Congress may condition deductions from gross income in any manner it sees fit. Helvering v. Industrial Life Ins. Co., 229 U. S. 371; Pearl E. Deputy et al. v. du Pont, . . . U. S. . . . (Jan. 8, 1940). It may be, as petitioner says, that it was the purpose of Congress to liberalize depletion allowance, but if so, the liberality was confined to the offer. It did not extend to the time or manner of taking advantage of it.

It appears to be conceded—and the concession is implicit in Mead Coal Co. v. Commissioner, supra—that a taxpayer who knows the law and who desires

percentage depletion is bound to state his choice in his first return under the act, failing which the statute peremptorily removes the right to apply that method in the first and all future tax years. The reason for this peremptory rule is obvious; and the statute contains no saving clause relieving a taxpayer or authorizing the Commissioner to relieve him from the consequences of the rule on a showing that he was ignorant of it. We know of no general power in the Commissioner to waive a mandatory provision of this sort on proof that the taxpayer did not know of its existence; and it is a novel rule of interpretation which varies the meaning of a statute to suit the mental state of those affected by it.

It is thus inadmissible to assume that Congress intended the statutory plan to bind those only who have actual knowledge of it. Government cannot proceed on that basis. The act (§53 (a) (2)) authorizes the Commissioner to grant a reasonable extension of time for filing returns;[5] and the recourse of one in the situation of petitioner would seem to be confined to the obtaining of an extension, if additional time is needed in which to investigate current legislation.

Our opinion heretofore filed as the ground for the judgment of affirmance heretofore rendered is withdrawn and this opinion is substituted therefor. Petition for rehearing denied.

---

[5]Regulation 86, Art. 53-2, Revenue Act of 1934.

Mathews, Circuit Judge (dissenting):

Respondent disallowed the depletion deduction claimed by petitioner because, as stated by respondent, the claim was "based upon an amended return" instead of an original return. On that ground and no other, respondent defended and sought to justify his action. He did not, before the Board of Tax Appeals or in this court, claim or suggest that the amended return was not timely. His sole contention, before the Board and here, was that the amended return was not a "first return", within the meaning of §114(b) (4) of the Revenue Act of 1934, 48 Stat. 710, 26 U. S. C. A. §114(b) (4), and that, therefore, the claimed deduction could not be allowed. This contention, which the Board upheld, should be rejected. Haggar Co. v. Helvering, . . . U. S. . . ., decided January 2, 1940;* C. H. Mead Coal Co. v. Commissioner, 4 Cir., 106 F.2d 388, 390. Since respondent has raised no question as to the timeliness of the amended return, this court cannot, with propriety, consider or decide any such question.

The decision should be reversed.

[Endorsed]: Opinion and Dissenting Opinion. Filed Mar. 16, 1940. Paul P. O'Brien, Clerk.

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*Reversing Haggar Co. v. Commissioner, 5 Cir., 104 F.2d 24, relied on by respondent.

[Title of Circuit Court of Appeals and Cause.]

ORDER STAYING ISSUANCE OF MANDATE

Upon application of Mr. Robert Ash, counsel for the petitioner, and good cause therefor appearing, It Is Ordered that the issuance, under Rule 28, of the mandate of this Court in the above cause be, and hereby is stayed to and including April 15, 1940; and in the event the petition for a writ of certiorari to be made by the petitioner herein be docketed in the Clerk's office of the Supreme Court of the United States on or before said date, then the mandate of this Court is to be stayed until after the said Supreme Court passes upon the said petition.

WILLIAM HEALY
United States Circuit Judge.

Dated: San Francisco, California, March 18, 1940.

[Endorsed]: Filed Mar 19 1940. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

CERTIFICATE OF CLERK, U. S. CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT, TO RECORD CERTIFIED UNDER RULE 38 OF THE REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES

I, Paul P. O'Brien, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing fifty-nine (59) pages, numbered from and including 1 to and including 59, to be a full, true and correct copy of the entire record of the above-entitled case in the said Circuit Court of Appeals, made pursuant to request of counsel for the petitioner, and certified under Rule 38 of the Revised Rules of the Supreme Court of the United States, as the originals thereof remain on file and appear of record in my office.

Attest my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 25th day of March, A. D. 1940.

[Seal] PAUL P. O'BRIEN,
Clerk.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed May 20, 1940

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(9429)

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Supreme Court U.S.
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APR 11 1940
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1939.

No. [redacted] 50

J. E. RILEY INVESTMENT COMPANY,
PETITIONER,

VS.

COMMISSIONER OF INTERNAL REVENUE,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

ROBERT ASH,
WILLIAM J. SEBALD,
Munsey Building,
Washington, D. C.,
Attorneys for Petitioner.

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INDEX

PETITION

Jurisdiction 2
Question Presented 2
Summary Statement of Matter Involved 3
Reasons Relied On for the Allowance of the Writ 7
Conclusion 10

BRIEF

Opinions Below 11
Jurisdiction 11
Statute Involved 11
Statement of the Case 12
Specification of Errors 12
Argument 13
Conclusion 16

TABLE OF CASES

Bell & Grant vs. Bruen, 1 How. (42 U. S.) 169, 187 ..... 10, 16
Burnet vs. Commonwealth Improvement Co., 287 U. S. 415, 418 ..... 10, 16
C. H. Mead Coal Company, 38 B. T. A. 1163 5
C. H. Mead Coal Company, 106 F. (2d) 388 ..... 6, 7, 10, 13
Dorothy Glenn Coal Mining Company, 38 B. T. A. 1154 5
Haggar Company vs. Helvering, 84 L. Ed. 287, 60 S. Ct. 337 ..... 2, 8, 14
Helvering vs. Clifford, 84 L. Ed. 504 15
Helvering vs. Wood, 84 L. Ed. 511, 514 ..... 10, 15
Walter C. Hill, 41 B. T. A. No. 38 (Feb. 1, 1940) 7
Kehoe-Berge Coal Co., 41 B. T. A. No. 45 (Feb. 7, 1940) 7
Zellerbach Paper Co. vs. Helvering, 293 U. S. 172 ..... 9, 14

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Supreme Court of the United States

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J. E. RILEY INVESTMENT COMPANY,
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VS.

COMMISSIONER OF INTERNAL REVENUE,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

To the Honorable, The Chief Justice and The Associate Justices of the Supreme Court of the United States:

PETITION.

J. E. Riley Investment Company, by its counsel, prays that a writ of certiorari issue to review the judgment

of the United States Circuit Court of Appeals for the Ninth Circuit entered in the above-entitled case December 26, 1939 (R. 46), affirming a decision of the United States Board of Tax Appeals (R. 19-28). After this Court's decision in *Haggar Company* v. *Helvering*, 84 L. Ed. 287, 60 S. Ct. 337, a petition for rehearing was filed. The said petition for rehearing was denied March 16, 1940, in an opinion, Mathews, Judge, dissenting, which withdrew the opinion of December 26, 1939 (R. 47-58).

JURISDICTION.

The judgment of the Circuit Court of Appeals sought to be reviewed was entered December 26, 1939. Jurisdiction to issue the writ requested is found in Section 240 of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED.

Is the petitioner, a gold mining corporation, entitled to percentage depletion under Section 114 (b) (4) of the Revenue Act of 1934? Or is it to be denied depletion for 1934 and all succeeding years, because, by reason of its isolated location in the interior of Alaska, it had no knowledge of the enactment of the provision allowing percentage depletion and, therefore, could not and did not "elect" to take the percentage depletion allowance in its original 1934 return, although such allowance was claimed in an amended return?

SUMMARY STATEMENT OF MATTER INVOLVED.

The facts were concisely and fairly found by the Board of Tax Appeals as follows (R. 19-22):

"Petitioner is a corporation organized under the laws of Nevada, with its principal office and place of business at Flat, Alaska. Its business is the mining of gold.

"Flat is located in a remote part of Alaska on the 52nd parallel of latitude and 158th meridian of longitude. During the season of navigation, the usual means of travel to Flat from Seward, the seaport, is from Seward, by railroad, to Nenana on the Yukon River, a distance of 415 miles, then by water via the Yukon River to Holy Cross, a distance of over 700 miles, and thence via a tributary of the Yukon to Flat, a distance of 420 miles. When navigation is not open, travel to and from Flat is either by plane or on foot. It requires about two weeks to go over the 400-mile trail on foot from Flat to Anchorage, which is the nearest town.

"The uncertainty and slowness of the winter mail service invariably resulted in current tax return forms reaching Flat too late for timely execution and filing. In order to avoid delinquency, it was the custom of petitioner's officers to use old return forms; consequently petitioner's original return for 1934 was filed on a 1933 form which had been mailed to petitioner by the Collector of Internal Revenue at Tacoma, Washington. In the winter of 1934, mail came to Flat part way by plane and part way by dog team. In order to be sure of filing the 1934 return on time, an officer of petitioner executed it on January 2, 1935, using the 1933 form, as stated. It reached Tacoma on January 29, but mail from Flat sometimes took two months in arriving at Tacoma.

"When petitioner's first 1934 return was filled out, its officers did not know of the statutory provisions allowing percentage depletion, but did know that unless the law had been changed, petitioner was not entitled to depletion, as it had no basis for cost depletion. The Collector, in sending the forms, had not advised the petitioner with respect to statutory depletion, and all the knowledge then available to it on this score was contained in Instruction No. 23 attached to the 1933 form, which reads as follows:

> '23. Depletion.—If a deduction is claimed on account of depletion, secure from the Collector Form D (minerals), Form E (coal), Form F (miscellaneous non-metals), Form O (oil and gas), or Form T (timber), fill in and file with return. If complete valuation data have been filed with Questionnaire in previous years, then file with this return information necessary to bring your depletion schedule up to date, setting forth in full statement of all transactions bearing on deductions or additions to value of physical assets with explanation of how depletion deduction for the taxable year has been determined. See Sections 23 (1) and 114 of the Revenue Act of 1932.'

"Petitioner's officer read the instructions before executing the return for 1934.

"Petitioner's officers first actually learned of the statutory depletion provisions in August, 1935, when a revenue agent visited Flat and advised that petitioner was entitled to percentage depletion for both 1933 and 1934. This agent prepared reports to that effect, as a result of which a refund was paid for 1933, but not for 1934; as to the latter year, the respondent ruled that peti-

tioner had failed to claim percentage depletion in its original return and hence was not entitled to claim it subsequently.

"If petitioner's officers had known of the 1934 statutory provisions, they would have elected to take percentage depletion.

"As soon as petitioner's officers were advised that percentage depletion had been disallowed, they filed both an amended return claiming such depletion in the amount of $13,600.57, and a claim for refund.

"Petitioner's gross receipts from gold mining for the year 1934 were $99,711.56, and it has paid a tax for that year in the amount of $4,684.00.

"In its opinion, the Board states (R. 25):

"Had petitioner's officers known of the election provided by the 1934 Act, they would have exercised it. Since petitioner had no basis for cost depletion, their 'election,' in the premises, would really have been as between claiming a deduction and not claiming it, for if they did not deduct by a use of the percentage method, they could not deduct at all. Not knowing of this statutory right, their collective feeling at the time they executed the 1934 return was that they were not entitled to depletion of any kind."

The Board of Tax Appeals, on the authority of *Dorothy Glenn Coal Mining Company*, 38 B. T. A. 1154, and *C. H. Mead Coal Company*, 38 B. T. A. 1163, affirmed the Commissioner (R. 19-28) on the narrow ground that the "first return" designated in the statute meant the first form filed, so an election made in an amended return did not comply with the statute.

The Fourth Circuit reversed the *Mead Coal Company* case, 106 F. (2d) 388, stating:

> "In using the words 'first return' Congress evidenty intended to include a completed first return or a first return as properly amended and did not intend to limit the taxpayer's right of election to the first form filed * * *. A first return is no less a first return because amended * * *"

The Ninth Circuit affirmed the Board in the case at bar and, in so doing, expressly indicated its disagreement with the Fourth Circuit in the Mead Coal Company case (R. 51).

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

I.

The decision below is in direct conflict with the decision of the Fourth Circuit in C. H. Mead Coal Co. v. Commissioner, 106 F. (2d) 388.

The Fourth Circuit in construing the statute here involved under substantially similar facts has reached a conclusion directly contrary to the conclusion in the case at bar. *C. H. Mead Coal Co.* v. *Commissioner,* 106 F. (2d) 388.

In the Mead case, the "election" to take a percentage depletion deduction for 1934 was first stated in an amended return filed February 6, 1936. In the case at bar the election to take percentage depletion for 1934 was first made in an amended return mailed February 8, 1936, and received by the Collector March 3, 1936 (R. 4, 8).*

The Ninth Circuit in the case at bar describes the conflict as follows (R. 51):

> "Petitioner argues that amended returns, while not provided for by law, are recognized and have been uniformly construed as being amendments or supplements to the original return. Hence, it is said, the 'first' return means an amended first return; so, an election made in an amended first return is an election made in a 'first' return.

---

*The Board of Tax Appeals indicates it may have adopted the **Mead Coal Company** theory to the extent that an election to take percentage depletion is "timely" and, therefore, effective if made in an amended return filed before returns for the succeeding taxable year are due. See **Walter C. Hill,** 41 B. T. A. No. 38 (Feb. 1, 1940), and **Kehoe-Berge Coal Co.,** 41 B. T. A. No. 45 (Feb. 7, 1940).

"In the Fourth Circuit, in *C. H. Mead Coal Co.* v. *Commissioner,* 106 F. (2d) 388, the court reached a similar conclusion, holding that in using the words 'first return' Congress intended to include a first return as properly amended. * * * The holding appears to confuse the statutory requirement with the supposed authority or duty of the Commissioner to relieve against mistakes."

* * * * * * *

"* * * By first return, we think, Congress had reference to the return contemplated by Sec. 53 of the act, that is, to the return required to be filed on or before the 15th day of March following the close of the calendar year, or within such extended time, not exceeding six months, as has been granted by the Commissioner under Sec. 53 (a) (2)."

II.

The decision below is in conflict with decisions of this Court.

In *Haggar Company* v. *Commissioner,* 84 L. Ed. 287, 60 S. Ct. 337, decided January 2, 1940, this Court was confronted with a statute dealing with the capital stock tax, which provided:

"the adjusted declared value shall be the value, as declared by the corporation in its *first return* under this section *(which declaration of value cannot be amended)*" (Italics supplied).

This Court held:

"The 'first return' as the context shows is the return for the first tax year of the taxpayer and the characterization of the return as 'first' is obviously used to distinguish the return made for the first year from the return 'for any subsequent year' * * *."

This Court adds:

"A timely amended return is as much a 'first return' for the purpose of fixing the capital stock

value in contradistinction to returns for subsequent years, as is a single return filed by the taxpayer for the first year (citing authorities); see, also, similarly construing the phrase 'first return' under Sec. 114 (b) (4) of the Revenue Act of 1934, 48 Stat. 680, 710; *C. H. Mead Coal Co.* v. *Commissioner*, 106 F. (2d) 388, 390."

The Mead case cited above is the case which is in admitted conflict with the case at bar. The Court below in the case at bar, however, felt that its interpretation is in harmony with this Court's decision in the Haggar case (R. 52).

The decision below likewise seems to be in conflict with *Zellerbach Paper Co.* v. *Helvering*, 293 U. S. 172, wherein, in a limitations case, it was held that an amended return is amendatory and supplementary to, relates back to, and becomes part of, the first form filed.

III.

The decision below departs from the accepted and usual course of judicial proceedings by disposing of this case on a ground not raised in, or considered by, the trial tribunal.

As Judge Mathews states in his dissenting opinion herein (R. 58), the Commissioner denied depletion solely on the ground that the claim was "based upon an amended return" instead of an original return. On this ground and no other the taxpayer sought to justify his action. No question of the timeliness of the amended return was suggested or raised before the Board of Tax Appeals or the Circuit Court of Appeals.

It is established law that an appellate court cannot consider and dispose of cases on issues not raised in the lower tribunal.

Burnet v. *Commonwealth Improvement Co.*, 287 U. S. 415, 418.

Helvering v. *Wood*, 84 L. Ed. 511, 514 (February 26, 1940).

Bell & Grant v. *Bruen*, 1 How. (42 U. S.) 169, 187.

In *Mead Coal Co.* v. *Commissioner*, 106 F. (2d) 388, the amended return claiming percentage depletion for 1934 was filed February 6, 1936. In the case at bar the amended return claiming percentage depletion for 1934 was mailed February 8, 1936, and received by the Collector March 3, 1936 (R. 4, 8). Apparently, the question of the timeliness of the amended return was not raised in the *Mead Coal Company* case. Likewise, as Judge Mathews points out, it was not raised or argued in the case at bar.

CONCLUSION.

For the reasons stated, the writ of certiorari should issue to resolve the conflicts mentioned.

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Munsey Building,
Washington, D. C.,
Attorneys for Petitioner.

April, 1940.

Brief in support of Petition for a Writ of Certiorari begins on following page.

BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI.

OPINIONS BELOW.

The first opinion of the Circuit Court of Appeals (108 F. (2d) 713) was withdrawn (R. 46, 47 and 57) so is not in the record. The second opinion of the Circuit Court of Appeals is not, as yet, officially reported, but appears in the record at pages 48-58. The Memorandum Findings of Fact and Opinion of the Board of Tax Appeals are not officially reported but appear in the record at pages 19-28.

JURISDICTION.

The jurisdiction of this Court is discussed at page 2 hereof.

STATUTE INVOLVED.

Sec. 23, Revenue Act of 1934:

> "Deductions from Gross Income. In computing net income there shall be allowed as deductions: * * * (m) Depletion.—In the case of mines, oil and gas wells, other natural deposits, and timber, a reasonable allowance for depletion * * *, according to the peculiar conditions in each case; * * *"

Revenue Act of 1934, Section 114 (b) (4):

> "Percentage Depletion for Coal and Metal Mines and Sulphur.—The allowance for depletion under section 23 (m) shall be, in the case of coal mines, 5 per centum, in the case of metal mines, 15 per centum, and, in the case of sulphur mines or deposits, 23 per centum, of the gross income from the property during the taxable year, * * *. Such allowance shall not exceed 50 per centum of the net in-

come of the taxpayer (computed without allowance for depletion) from the property. A taxpayer making his first return under this title in respect of a property shall state whether he elects to have the depletion allowance for such property for the taxable year for which the return is made computed with or without regard to percentage depletion, and the depletion allowance in respect of such property for such year shall be computed according to the election thus made. If the taxpayer fails to make such statement in the return, the depletion allowance for such property for such year shall be computed without reference to percentage depletion. The method, determined as above, of computing the depletion allowance shall be applied in the case of the property for all taxable years in which it is in the hands of such taxpayer * * *."

STATEMENT OF THE CASE.

The facts are fully set forth in the petition at pages 3-6 hereof, so are not repeated here.

SPECIFICATION OF ERRORS.

(1) The Circuit Court of Appeals below erred in denying petitioner a percentage depletion deduction.

(2) The Circuit Court of Appeals below erred in holding that an "election" to take percentage depletion made in an amended return was not an election made in the "first return."

(3) The Circuit Court of Appeals below erred in considering the question of the timeliness of filing the amended return when that question was not raised or argued before the Board of Tax Appeals or the Circuit Court of Appeals.

ARGUMENT.

I.

The decision below is in direct and admitted conflict with a decision of the Fourth Circuit.

As pointed out in the petition at page 7, the Court below specifically admits (R. 51) its disagreement and conflict with *C. H. Mead Coal Co.* v. *Commissioner,* 106 F. (2d) 388. The Ninth Circuit in the case at bar states:

> "Petitioner argues that amended returns, while not provided for by law, are recognized and have been uniformly construed as being amendments or supplements to the original return. Hence, it is said, the 'first' return means an amended first return; so an election made in an amended first return is an election made in a 'first' return.
>
> "In the Fourth Circuit, in *C. H. Mead Coal Co.* v. *Commissioner*, 106 F. (2d) 388, the court reached a similar conclusion, holding that in using the words 'first return' Congress intended to include a first return as properly amended. * * * The holding appears to confuse the statutory requirement with the supposed authority or duty of the Commissioner to relieve against mistakes.
>
> * * * * * * *
>
> "* * * By first return, we think, Congress had reference to the return contemplated by Sec. 53 of the act, that is, to the return required to be filed on or before the 15th day of March, following the close of the calendar year, or within such extended time, not exceeding six months, as has been granted by the Commissioner under Sec. 53 (a) (2)."

In the Mead case, the "election" to take a percentage depletion deduction for 1934 was first stated in an amended return filed February 6, 1936. In the case

at bar the election to take percentage depletion for 1934 was first made in an amended return mailed February 8, 1936, and received by the Collector March 3, 1936 (R. 4, 8).

II.

The decision below is in conflict with decisions of this Court.

In *Haggar Company* v. *Commissioner*, 84 L. Ed. 287, 60 S. Ct. 337 (January 2, 1940), this court stated:

> "The 'first return' as the context shows is the return for the first tax year of the taxpayer and the characterization of the return as 'first' is obviously used to distinguish the return made for the first year from the return 'for any subsequent year' * * *.
>
> * * * * * * *
>
> "A timely amended return is as much a 'first return' for the purpose of fixing the capital stock value in contradistinction to returns for subsequent years as is a single return filed by the taxpayer for the first year (citing authorities); see, also, similarly construing the phrase 'first return' under Sec. 114 (b) (4) of the Revenue Act of 1934, 48 Stat. 680, 710; *C. H. Mead Coal Co.* v. *Commissioner*, 106 F. (2d) 388, 390."

It is significant that this Court, in the Haggar case, cited with approval the Mead Coal Company case which is in admitted conflict with the case at bar.

In *Zellerbach Paper Co.* v. *Helvering*, 293 U. S. 172, this Court, in a limitations case, held that an amended return is amendatory and supplementary to, relates back to, and becomes part of, the first form filed. The decision below is in conflict with the Zellerbach decision.

III.

The decision below departs from the accepted and usual course of judicial proceedings by disposing of this case on a ground not raised in, or considered by, the trial tribunal.

Judge Mathews' dissenting opinion in the case at bar expresses the view that the Commissioner disallowed the depletion deduction solely on the ground that the claim therefor was "based upon an amended return" and, on that ground and no other, sought to justify his action without claiming or suggesting before the Board of Tax Appeals or the Circuit Court of Appeals that the amended return was not timely. Consequently, the Circuit Court of Appeals could not, with propriety, consider or decide the question of the timeliness of the amended return.

The accepted and usual course of judicial procedure is that appellate courts must confine their review and decision to issues raised in the lower tribunals.

As recently as *Helvering* v. *Wood*, 84 L. Ed. 511, 514, decided February 26, 1940, the rule was held to be as stated above and the decision in favor of the taxpayer affirmed. The extent to which the rule is established is shown by the decision in *Helvering* v. *Clifford*, 84 L. Ed. 504, decided the same day, which resulted in a decision for the Commissioner on facts substantially similar to those in the Wood case. The reason for the different results in the cases mentioned was that the Clifford case was disposed of on the basis of a government contention which had not been made in the lower court in the Wood case.

On the same general question see:

Bell & Grant v. *Bruen*, 1 How. (42 U. S.) 169, 187.
Burnet v. *Commonwealth Improvement Co.*, 287 U. S. 415, 418.

In *Mead Coal Co.* v. *Commissioner*, 106 F. (2d) 388, the amended return claiming percentage depletion for 1934 was filed February 6, 1936. In the case at bar the amended return claiming percentage depletion for 1934 was mailed February 8, 1936, and received by the Collector March 3, 1936 (R. 4, 8). Apparently, the question of the timeliness of the amended return was not raised in the *Mead Coal Company* case. Likewise, as Judge Mathews points out, it was not raised or argued in the case at bar.

Conclusion.

For the reasons stated certiorari should issue to resolve the conflicts mentioned and to dispose of the case in accordance with the accepted and usual course of judicial proceedings.

ROBERT ASH,
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Munsey Building,
Washington, D. C.,
Attorneys for Petitioner.

April, 1940.

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Supreme Court of the United States

No. 897 50

J. E. RILEY INVESTMENT COMPANY, *Petitioner*,

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent*

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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May 14, 1940.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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Supreme Court of the United States

No. 897

J. E. RILEY INVESTMENT COMPANY, *Petitioner*,

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent*.

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

Certiorari is requested in this case principally on the ground that the decision below is in direct, obvious, and authoritatively recognized conflict with *Mead Coal Co.* v. *Commissioner*, (C. C. A. 4) 106 F. (2d) 388.

The Fourth Circuit in the *Mead* case held that an election to take a percentage depletion deduction for 1934 under Section 114 (b) (4) of the Revenue Act of 1934 **was valid** and effective if made in an amended return filed February 6, 1936.

In the case at bar the Ninth Circuit held that an election to take a percentage depletion deduction for 1934 under Section 114 (b) (4) of the Revenue Act of 1934 **was not valid** and, therefore, not effective if made in an amended return mailed to the Collector February 8, 1936.

Loose-leaf tax services are the accepted and established authority on questions of taxation. The Prentice-Hall Fed-

eral Tax Service and the Alexander Federal Tax Service have recognized and commented editorially on the conflict between the case at bar and the *Mead* case.

At ¶2375, the Alexander Service states:

> "In the view of the conflict between the Fourth and Ninth Circuits and the dissent, the issue cannot be regarded as finally settled."[1]

Prentice-Hall specifically states the existence of conflict at ¶62,334 and ¶62,514, and on Executive page 68,062. The discussion on page 68,062 concludes:

> "It is likely that this question will now be taken to the Supreme Court on the ground of conflict with a decision of the C. C. A. 4th Circuit."

We submit that the foregoing completely refutes the Government's statement (Br. p. 6) that:

> "The conflict between this decision and the *Mead* decision is, therefore, only on the narrow issue of when an amendment must be filed in order to be timely."

The Government in its brief, (page 6) does admit that, in the case at bar, the question of the timeliness of the amended return "was not directly presented or decided".[2]

In any event, the amendment in the case at bar was as "timely" as the amendment in the *Mead* case.

In the *Mead* case the amended return was filed February 6, 1936. In the case at bar the amended return was mailed February 8, 1936, (R. 4, 13) although in August, 1935, a Revenue Agent advised the taxpayer it was entitled to the percentage depletion deduction and made a report accordingly. (R. 21)

The Government's brief states that the issue of the timeliness of the amended return has been settled by *Haggar*

---

[1] See also ¶2144 Alexander Tax Service.

[2] The failure of the respondent to raise the question of the timeliness of the amended return is the basis of Judge Mathews' dissent herein. (R. 58)

Co. v. *Helvering,* No. 176, present term. Although petitioner does not admit the conflict is limited as respondent contends, it is obvious that the *Haggar* decision does not control.

The *Haggar* case involved a statute providing for a tax on the adjusted declared value of the capital stock of corporations.[3]

It specifically provided:

> "* * * the adjusted declared value shall be the value, as declared by the corporation in its first return under this section (*which declaration of value cannot be amended*) * * *." (Italics supplied)

The section quoted is part of the same 1934 Act involved in the case at bar. It was enacted in the light of the known interpretation of the taxing acts permitting amendments to returns to show proper items of income and deductions. If the Congress, which enacted the capital stock tax law, meant the same rule to apply to the depletion section as to the capital stock tax section, it would have specifically so stated in the statute.

Question is Important

The question is important and the conflict should be resolved to relieve the Board of Tax Appeals and the Courts of the burden of considering cases of this nature. At the present time, at least three cases involving Section 114 (b) (4) of the 1934 Revenue Act are pending before Circuit Courts of Appeal on appeal from the Board of Tax Appeals[4] and at least one such case has been decided by a Circuit Court.[5] Counsel is advised that other cases involv-

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[3] Section 701, Revenue Act of 1934.

[4] *Walter C. Hill,* et al., 41 B. T. A #38 (¶64,220 P-H), appealed to Sixth Circuit. *Kehoe-Berge Coal Co.,* 41 B. T. A. #45 (¶64,227 P-H), and *Pittston-Duryea Coal Co.,* Memo B. T. A. Opinion, Feb. 7, 1940 (¶64,292 P-H), appealed to Third Circuit.

[5] The *Commodore Mining Co.* v. *Commissioner,* affirming 40 B. T. A. 347, #61. Decided March 20, 1940 (C. C. A. 10), (¶62,534 P-H).

ing the section are pending in various divisions of the Bureau of Internal Revenue. Action on those cases can only result in litigation.

Amended Returns Have Always Been Accepted and Have Always Been Construed as Amendments or Supplements to Original Return.

There is no statutory authority for amended returns. However, as long ago as O. D. 113, C. B. 1919, p. 234, the Commissioner ruled:

> "A corporation may submit amended returns for previous years when through wrong accounting practice capital charges have been made to income."

To the same effect see Mim. 2207 C. B. 1919, p. 221; I. T. 1450, C. B. Dec. 1922, p. 200, and Articles 36 and 111 of Regulations 45 under the 1918 Act.

Courts have uniformly held that amended returns may be filed to show correct items of income and deductions. This is true even where the first return constituted an 'election'. In *Lucas* v. *Sterling Oil & Gas. Co.*, 62 F. (2d) 951, (C. C. A. 6), the taxpayer, under Treasury Regulations, had the option of charging certain expenditures in connection with oil and gas wells to capital or treating them as operating expense. An election, once made, was to control for all subsequent years. Taxpayer's original return for 1919 capitalized such expenditures. After other facts had been ascertained the taxpayer, February 10, 1921, filed an amended return which treated the expenditures as operating expenses. On neither return was a tax due. The 1920 return again treated such expenditures as operating expenses. Upon audit of the 1920 return the Commissioner ruled the expenditures for that year must be capitalized as the taxpayer had so elected in the 1919 return. The Court states (p. 951):

> "There is no statutory authority for amended returns, but it is well known that the Treasury Department

both in practice and by regulation (Articles 36 and 111 of Regulations 45) has been liberal in authorizing and accepting such returns."

The Court states that, after learning certain profits for 1919 should have been reported for that year, the taxpayer filed an amended return (p. 952):

> "This seems to us to constitute the first instance of a mature and deliberate choice by the appellee, based upon knowledge of all the material facts * * * and, in view of the effect of an election upon future returns, we do not think that such election should be held to be effected, unless based upon knowledge of this kind as indicative of a final and deliberate choice. * * * and where the initial return is filed upon incomplete knowledge of the material facts, and before the filing of a return for the subsequent year, the taxpayer ascertains other pertinent facts and files an amended return disclosing them, it seems to us that the initial return may properly be regarded as tentative in its nature, and as not constituting an election. In such case, the taxpayer should be permitted to do what he had the right to do in the first instance."[6]

The Government's brief in opposition relies heavily on *Pacific National Co.* v. *Welch*, 304 U. S. 191. This Court in that case specifically points out that an amended return cannot be filed to change the *method* of reporting income, as from a completed transaction method to an installment method. It did not decide there was error in the established law and administrative practice that amended returns are proper to show correct items of income or deduction.

It is common knowledge that thousands of amended returns are filed every year. To accept the contention of

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[6] The *Sterling Oil* case refutes respondent's statement (Br. p. 7) that "no statutory provision, or practice supports the view that an amended return is timely if filed before the time for the filing of the return for the next year".

the Department of Justice that amended returns are proper and effective only if filed within the time permitted for filing the first form, could very easily result in unlimited confusion and difficulty in the administration of the taxing laws.

Conclusion

A conflict exists which results in confusion and uncertainty. Certiorari should issue.

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May 14, 1940.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 50.

J. E. RILEY INVESTMENT COMPANY, *Petitioner,*

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent.*

BRIEF FOR PETITIONER.

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INDEX

	Page
Opinions Below	1
Jurisdiction	1
Statutes Involved	1
Statement of the Case	2
Specification of Errors to be Urged	5
Summary of Argument	5
Argument	8
Statute says depletion shall be allowed	8
History of Percentage Depletion	9
Amended returns are recognized and have been uniformly construed as being amendments or supplements to the original return	11
Election is dependent upon the opportunity to choose between two or more conflicting courses and, in the absence of such an opportunity to choose, there can be no election	22
Point on which case decided not raised before Board of Tax Appeals or Circuit Court of Appeals	24

TABLE OF CASES

	Page
Bierce v. Hutchins, 205 U. S. 340	22
Connor v. United States, 19 F. Supp. 97	24
Dorothy Glenn Coal Mining Co., 38 B. T. A. 1154	5, 22
Fleischmann Company v. United States, 270 U. S. 349	17
General Utilities & Operating Company v. Helvering, 296 U. S. 200	25
Haggar Company v. Helvering, 308 U. S. 389	6, 7, 17, 18
Helvering v. Achelis, 112 F. (2d) 929	25
Helvering v. Clifford, 309 U. S. 331	25
Helvering v. Salvage, 297 U. S. 106	25
Helvering v. Tex-Penn Oil Company, 300 U. S. 481	25
Helvering v. Wood, 309 U. S. 344	25
Johnston, F. Harold, Executor, 33 B. T. A. 551	21
Lucas v. Sterling Oil & Gas Company, 62 F. (2d) 951	14, 23
McIntosh v. Wilkinson, 36 F. (2d) 807	20
Mead, C. H. Coal Company, 38 B. T. A. 1163	5
Mead, C. H. Coal Company, 106 F. (2d) 388	8, 15, 17, 18, 21
Morrow, Becker & Ewing, Inc. v. Commissioner, 57 F. (2d) 1	21
Pacific National Company v. Welch, 304 U. S. 191	20
Raymond, Ralph Leslie, 34 B. T. A. 1171	23
Rhodes v. Commissioner, 111 F. (2d) 53	25
Robertson, Callie E., 28 B. T. A. 635	23
Stewart v. Kahn, 11 Wall. (78 U. S.) 493	23
Texas Cement Company v. McCord, 233 U. S. 157	17
Union Metal Manufacturing Co., 1 B. T. A. 395	14
United States v. Merriam, 263 U. S. 179	23
Zellerbach Paper Co. v. Helvering, 293 U. S. 172	15

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Opinions Below.

The opinion of the Circuit Court of Appeals is reported at 110 F. (2d) 655, and appears in the record at pages 48-58. The memorandum findings of fact and opinion of the Board of Tax Appeals are not officially reported, but appear in the record at pages 19-28.

Jurisdiction.

Jurisdiction of this Court is conferred by Section 240 of the Judicial Code, as amended by the Act of February 13, 1925. The writ of certiorari was allowed by an order filed May 20, 1940. (R. 61)

Statutes Involved.

Sec. 23. Revenue Act of 1934:

"Deductions from Gross Income. In computing net income there shall be allowed as deductions: * * * (m)

Depletion—In the case of mines, oil and gas wells, other natural deposits, and timber, a reasonable allowance for depletion * * *, according to the peculiar conditions in each case: * * *"

Section 114 (b) (4), Revenue Act of 1934:

"Percentage Depletion for Coal and Metal Mines and Sulphur.—The allowance for depletion under section 23 (m) shall be, in the case of coal mines, 5 per centum, in the case of metal mines, 15 per centum, and, in the case of sulphur mines or deposits, 23 per centum, of the gross income from the property during the taxable year, * * *. Such allowance shall not exceed 50 per centum of the net income of the taxpayer (computed without allowance for depletion) from the property. A taxpayer making his first return under this title in respect of a property shall state whether he elects to have the depletion allowance for such property for the taxable year for which the return is made computed with or without regard to percentage depletion, and the depletion allowance in respect of such property for such year shall be computed according to the election thus made. If the taxpayer fails to make such statement in the return, the depletion allowance for such property for such year shall be computed without reference to percentage depletion. The method, determined as above, of computing the depletion allowance shall be applied in the case of the property for all taxable years in which it is in the hands of such taxpayer * * *"

Statement of the Case.

The facts were fully found by the Board of Tax Appeals as follows: (R. 19-22)

"Petitioner is a corporation organized under the laws of Nevada, with its principal office and place of business at Flat, Alaska. Its business is the mining of gold.

"Flat is located in a remote part of Alaska on the 62nd parallel of latitude and 158th meridian of longitude. During the season of navigation, the usual means

of travel to Flat from Seward, the seaport, is from Seward, by railroad, to Nenana on the Yukon River, a distance of 415 miles, then by water via the Yukon River to Holy Cross, a distance of over 700 miles, and thence via a tributary of the Yukon to Flat, a distance of 420 miles. When navigation is not open, travel to and from Flat is either by plane or on foot. It requires about two weeks to go over the 400-mile trail on foot from Flat to Anchorage, which is the nearest town. The uncertainty and slowness of the winter mail service invariably resulted in current tax return forms reaching Flat too late for timely execution and filing. In order to avoid delinquency, it was the custom of petitioner's officers to use old return forms; consequently petitioner's original return for 1934 was filed on a 1933 form which had been mailed to petitioner by the Collector of Internal Revenue at Tacoma, Washington. In the winter of 1934, mail came to Flat part way by plane and part way by dog team. In order to be sure of filing the 1934 return on time, an officer of petitioner executed it on January 2, 1935, using the 1933 form, as stated. It reached Tacoma on January 29, but mail from Flat sometimes took two months in arriving at Tacoma.

"When petitioner's first 1934 return was filled out, its officers did not know of the statutory provisions allowing percentage depletion, but did know that unless the law had been changed, petitioner was not entitled to depletion, as it had no basis for cost depletion. The Collector, in sending the forms, had not advised the petitioner with respect to statutory depletion, and all the knowledge then available to it on this score was contained in Instruction No. 23 attached to the 1933 form, which reads as follows:

> '23. Depletion.—If a deduction is claimed on account of depletion, secure from the collector Form D (minerals), Form E (Coal) Form F (miscellaneous non-metals) Form O (oil and gas), or Form T (tim-

ber), fill in and file with return. If complete valuation data have been filed with Questionnaire in previous years, then file with this return information necessary to bring your depletion schedule up to date, setting forth in full statement of all transactions bearing on deductions or additions to value of physical assets with explanation of how depletion deduction for the taxable year has been determined. See Sections 23 (1) and 114 of the Revenue Act of 1932.'

"Petitioner's officer read the instructions before executing the return for 1934.

"Petitioner's officers first actually learned of the statutory depletion provisions in August, 1935, when a revenue agent visited Flat and advised that petitioner was entitled to percentage depletion for both 1933 and 1934. This agent prepared reports to that effect, as a result of which a refund was paid for 1933, but not for 1934; as to the latter year, the respondent ruled that petitioner had failed to claim percentage depletion in its original return and hence was not entitled to claim it subsequently.

"If petitioner's officers had known of the 1934 statutory provisions, they would have elected to take percentage depletion.

"As soon as petitioner's officers were advised that percentage depletion had been disallowed, they filed both an amended return claiming such depletion in the amount of $13,600.57, and a claim for refund.

"Petitioner's gross receipts from gold mining for the year 1934 were $99,711.56 and it has paid a tax for that year in the amount of $4,684."

In its opinion, the Board states (R. 25):

"Had petitioner's officers known of the election provided by the 1934 Act, they would have exercised it. Since petitioner had no basis for cost depletion, their 'election' in the premises, would really have been as between claiming a deduction and not claiming it, for

> if they did not deduct by a use of the percentage method, they could not deduct at all. Not knowing of this statutory right, their collective feeling at the time they executed the 1934 return was that they were not entitled to depletion of any kind."

The amended return filed by the petitioner was mailed February 8, 1936 and received by the Collector March 3, 1936. (R. 4, 8)

The Board of Tax Appeals, on the authority of *Dorothy Glenn Coal Mining Company,* 38 B. T. A. 1154, and *C. H. Mead Coal Company,* 38 B. T. A. 1163, affirmed the Commissioner on the ground that the "first return" designated in the statute meant the first form filed, so an election made in an amended return did not comply with the statute.

The Ninth Circuit affirmed the Board of Tax Appeals (Judge Mathews dissenting) (R. 48-58) and, in so doing, reached a conclusion in direct conflict with the Fourth Circuit in *C. H. Mead Coal Company* v. *Commissioner,* 106 F. (2d) 388.

Specification of Errors to be Urged.

1. The Court below erred in holding that the taxpayer is not entitled to depletion under Section 114 (b) (4) of the Revenue Act of 1934.

2. The Court below erred in holding that the claiming of percentage depletion in its amended return for 1934 did not comply with the provisions of Section 114 (b) (4) of the Revenue Act of 1934 and did not entitle the taxpayer to a deduction for percentage depletion.

3. The Court below erred in deciding for the Commissioner.

Summary of Argument.

The statute commands that a reasonable deduction for depletion *shall* be allowed. The section here involved merely states the method of computing the allowance. The "election" made in the "first" return to take or not to take percentage depletion governs all succeeding years. This tax-

payer, because of its isolated location in Alaska, had no knowledge of the provision for percentage depletion. Despite this, the Court below held that the doing of the impossible is a condition precedent for the deduction and, because the taxpayer failed to "elect", it must be perpetually punished for the failure.

All the revenue acts, beginning with that of 1913, have provided for a deduction for depletion. The administration of the section was difficult, and resulted in battles between experts to show basic valuations, depletable reserves and other facts. In 1926 percentage depletion was substituted for discovery depletion in the case of oil and gas wells "in the interest of simplicity and certainty of administration". A similar provision was made in 1932 in the case of coal, metal and sulphur mines. The 1934 Act continued the percentage depletion but stated that coal, metal and sulphur miners should state in their "first" return under the Act if they "elected" to take percentage depletion. Such an election governed all succeeding years.

Amended returns have always been recognized and have been uniformly construed as being amendments or supplements to the original return. Regulations, beginning with those under the 1916 Act, have provided for amended returns to correctly show items of income and deduction. So have Treasury rulings, Board of Tax Appeals and Court decisions, including decisions of this Court.

The rule is that a "first" return is a return for the first year. This includes not only the first form filed, but also an amended or completed return for the first year. A first return is no less a first return because amended.

The rule is in accordance with established law that pleadings and other documents may be amended to claim rights which existed when the original document was filed.

Haggar Company v. *Helvering*, 308 U. S. 389, is authority for this taxpayer's position. In prohibiting amendments to the declared value of capital stock, Congress legislated in the light of the established law permitting amended re-

turns. Had it intended the same prohibition to apply in the present case, it would have so provided in the statute. The 1934 Act contained the prohibition against amendment of the declared value in capital stock tax returns.

A timely amendment to a return is one made before the time for filing the return for the next succeeding year.

This case is not governed by the decisions which hold that a taxpayer, by an amended return, cannot change from one method of reporting income to a different method. In addition, in those cases, the taxpayer had the right to elect as to method.

Another line of cases which supports this taxpayer's position is that in which amended returns are permitted where the taxpayer has scant notice of radical changes in the law.

Election is dependent upon the opportunity to choose between two or more conflicting courses and, in the absence of such opportunity to choose, there can be no "election". The word has a judicially settled meaning and it is to be presumed that Congress legislated in the light of that meaning.

In interpreting the "election" provisions of Section 131 of the 1932 Act covering credits for foreign taxes paid, the Board and the Courts have had no difficulty in saying that the election can be made in an amended return. The failure to elect under section 131 results in denying the deduction for only one year and does not provide perpetual punishment, as does the rule of the Court below in the case at bar.

This case was decided below on the ground that the amended return was not timely. Before the Board and the Circuit Court of Appeals, the sole question presented was that an amended return was not a "first" return. This Court in the *Haggar* case decided that question favorably to the taxpayer. As the issue of timeliness was not raised below, it should not have been considered by the Circuit Court, and cannot be considered with propriety by this Court. Judge Mathews dissented on this ground in the Court below.

Argument.

Statute says depletion shall be allowed.

The Court is called upon to decide if, in computing income tax due from this taxpayer, it is entitled to a deduction for percentage depletion for 1934 and all subsequent years. The statute is specific in commanding that depletion *shall* be allowed to metal miners. The exact language is:

Sec. 23. Revenue Act of 1934:

> "In computing net income there *shall* be allowed as deductions: * * * (m) Depletion.—In the case of mines, oil and gas wells, other natural deposits and timber, a *reasonable allowance* for depletion * * * according to the peculiar conditions in each case * * *". (Italics supplied)

After providing that a reasonable deduction for depletion shall be allowed, Congress, in Section 114 (b) (4), merely prescribed the manner in which the allowance for depletion is to be computed. The purpose of Congress in providing percentage depletion was to broaden the allowance and remove administrative difficulties.[1] The decision below completely denies a deduction for depletion which the statute says shall be allowed, not only for 1934, but for all subsequent years, as the statute states that the election made in the "first" return shall be binding on all subsequent years.

In other words, although this taxpayer, because of its isolated location in the interior of Alaska, had no knowledge of the provision for percentage depletion and, therefore, could not "elect" to take the deduction, it is, under the

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[1] The Fourth Circuit in *C. H. Mead Coal Company* v. *Commissioner*, 106 F. (2d) 388, states (P. 391): "We agree * * * that the depletion provisions of the Revenue Acts of 1932 and 1934 are liberalizing, rather than limiting, provisions and that Congress intended to allow depletion deductions by one of the two methods, and intended to give taxpayers a right to elect whichever method they preferred."

Circuit Court's decision, going to be perpetually punished. To put it another way, the Court below required the doing of the impossible as a condition precedent to the allowance of the deduction.

History of percentage depletion.

Beginning with the Act of October 3, 1913, the various Revenue Acts have provided for a deduction for depletion where income is derived from the extraction of natural deposits or timber.

The Revenue Act of 1918 (Sec. 234 (a) (9)), inserted language, which still remains in the statute, providing for the deduction: "In the case of mines, oil and gas wells, other natural deposits, and timber, a reasonable allowance for depletion * * * according to the peculiar conditions in each case * * *". The 1918 Act also provided for "discovery" depletion where the fair market value of the property was grossly disproportionate to the cost.

The administration of the depletion sections, particularly the "discovery" depletion section, was difficult. In theory, the owner of a natural resource was supposed to own a certain number of depletable units, some of which were consumed each year, and he was allowed to deduct from income the cost or discovery valuation basis of the units consumed. In practice, great difficulties were encountered in determining basic valuations, depletable reserves, depletion rates and other facts.

In other words, the administration of the depletion section resolved itself into a battle between valuation and mining engineers and other experts representing the taxpayer on the one hand and the Commissioner on the other. In an effort to eliminate this confusion, Congress, in the 1926 Act, eliminated discovery depletion in the case of oil and gas wells and substituted percentage depletion. This step was taken "in the interest of simplicity and certainty in administration". (Seidman's Legislative History of Federal Income Tax Laws, p. 584)

The percentage depletion method worked so well in the case of oil and gas wells that percentage depletion was adopted and discovery depletion abandoned in the case of coal, metal and sulphur mines by Section 114 (b) (4) of the 1932 Act. The said Act did not require that a taxpayer make an election to take percentage depletion for 1933, but did require that he state in his 1933 return if he desired percentage depletion for all succeeding years, and that the depletion allowance should be computed for all succeeding taxable years in accordance with the election therein made.

The 1934 Act in Sec. 114 (b) (4) reenacted the percentage depletion provisions of the 1932 Act with reference to coal, metal and sulphur mines, but gave a new opportunity of election, stating:

> "A taxpayer making his first return under this title in respect of a property shall state whether he elects to have the depletion allowance for such property for the taxable year for which the return is made computed with or without regard to percentage depletion, and the depletion allowance in respect of such property for such year shall be computed according to the election thus made. If the taxpayer fails to make such statement in the return, the depletion allowance for such property for such year shall be computed without reference to percentage depletion. The method, determined as above, of computing the depletion allowance shall be applied in the case of the property for all taxable years in which it is in the hands of such taxpayer, * * *."

The Senate and House Reports and the Congressional discussion all specifically state that the "election" provision was inserted "to avoid administrative complexity" (Seidman's Legislative History of Federal Income Tax Laws, page 353).

The "election" thus made would "avoid administrative complexity" in the case of those taxpayers using the percentage method by eliminating the battle of experts necessary to determine the essential facts used in computing

cost or discovery depletion. Or it might be that the purpose was the prevention of the taxpayers taking percentage depletion in one year, jumping to cost depletion the next, and vice versa.

Such switching apparently has not been a problem in the case of oil and gas producers, who may switch from one method in one year to another method in the next. Or they may use cost depletion for one "property" and percentage depletion for another "property" in the return for the same year.

In the case at bar, the Board states: (R. 25)

> "Had petitioner's officers known of the election provided by the 1934 Act, they would have exercised it. Since petitioner had no basis for cost depletion, their 'election' in the premises, would really have been as between claiming a deduction and not claiming it, for if they did not deduct by a use of the percentage method, they could not deduct at all."

Amended returns are recognized and have been uniformly construed as being amendments or supplements to the original return.

The deduction here sought was denied by the Commissioner on the sole ground that the taxpayer "failed to make an election in the original 1934 return". (R. 8) The amended return was treated as being of no effect. This brings us to a discussion of the practice of accepting amended returns and their effect.

In the case at bar the first return form for 1934, filed on a 1933 blank, reached the Collector at Tacoma, Washington, January 29, 1935. (R. 20) In August, 1935, a revenue agent visited Flat and advised the taxpayer it was entitled to percentage depletion for 1933 and 1934 and prepared reports to that effect. (R. 21) The Commissioner overruled the agent and held that, as the taxpayer had not claimed percentage depletion for 1934, it would not be allowed. As soon as petitioner's officers were advised that percentage

depletion had been disallowed, they mailed to the Collector an amended return claiming percentage depletion. (R. 22) The said claim was mailed February 8, 1936 and was received by the Collector March 3, 1936. (R. 4, 8)

There is no statutory provision for amended returns. However, such amended returns have always been recognized and accepted for the purpose of showing correct items of income and deduction. As long ago as Regulations 33, promulgated under the Act of September 8, 1916, as amended by the Act of October 3, 1917, it was stated in Article 128:

> "Amended Returns.—If, however, a corporation discovers or detects expenses or liabilities which were due or payable during a preceding year, it will be permissible for it to make an amended return for the year to which such expense or liability applies, include such expense in the deductions of that year, and file a claim for refund for any taxes overpaid by reason of the failure to deduct such expense or liability in the original return of that year."

The foregoing is important because it shows that, in the absence of statutory restriction on amending returns,[2] such amended returns have always been accepted to correctly reflect items of income and deductions.

Article 36 of Regulations 45 provide that taxpayers must file amended returns under certain circumstances where income has been overstated or understated.

Examples of other Regulations dealing with amended returns are:

> Regulations 45, Article 111 (1918 Act)
> Regulations 65, Articles 36, 112 (1924 Act)
> Regulations 69, Articles 36, 112 (1926 Act)

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[2] For example, the capital stock tax provisions which were the basis of *Haggar Co.* v. *Helvering*, 308 U. S. 389.

Regulations 86 under the 1934 Act provided for amended returns in certain instances (Articles 43-2) and a similar provision has been carried through to Regulations 103 which are currently in effect. (Section 19. 43-2)

The Prentice-Hall Federal Tax Service, which is the standard reference work on Federal taxes, states: (¶17,089)

> "Although the law does not give specific rules regarding the filing of amended returns, this method of correcting errors made in returns of prior years has been consistently recognized. O. D. 113, C. B. 1919, p. 234, Mim. 2207 C. B. 1919, p. 221. O. D. 1131, C. B. Dec. 1921, p. 289. I. T. 1201, C. B. June, 1922, p. 345. I. T. 1450, C. B. June, 1922, p. 200, Reg. 103, Sec. 19, 43-2."

At ¶6009 B, the same Service states:

> "As in the case of amounts erroneously reported as income, the taxpayers' remedy (when items were erroneously claimed as deductions) is to file an amended return and a claim for refund. If the refund is barred, no other relief is available."

The rulings of the Treasury have been as consistent as the regulations on the question of amended returns.

Bulletin F, Bureau of Internal Revenue, states at page 33, (Prentice-Hall ¶14,260) that if a deduction for depreciation is, through inadvertence, not taken, an amended return showing the proper deduction, should be filed.

Where the funds of a minor were misappropriated by a guardian, it was held that amended returns, reflecting the facts, should be filed for 1917, 1918 and 1919. A. R. M. 144, C. B. Dec. 1921, p. 139.

T. D. 3220, C. B. Dec. 1921, p. 285 provided that all taxpayers who used appreciated or inflated value in determining the amount of their invested capital, must file amended returns within a designated time.

This brief will not be burdened with further citation of Treasury regulations or rulings to show the law is established that amended returns are acceptable to correct errors of income or deduction.

It is significant that in neither the regulations, nor the decisions, is there any requirement that amended returns, to be effective, must, as held in the Court below, be filed before the due date of the original return.

The Board of Tax Appeals also has, from the beginning, followed the same rule. In *Union Metal Manufacturing Co.*, 1 B. T. A. 395, the Board held that where a taxpayer failed to claim a deduction for the depreciation of patents in its original return, but did make such a claim in an amended return, the deduction should be allowed.

The Courts have had frequent opportunity to pass on the question of amended returns and have upheld the viewpoint of this taxpayer. In so doing, they have uniformly held that amended returns may be filed to show correct items of income and deduction. This is true even where the first return constituted an "election." In *Lucas* v. *Sterling Oil & Gas Co.*, 62 F. (2d) 951, 12 A. F. T. R. 90 the taxpayer under Treasury Regulations, had the option of charging certain expenditures in connection with oil and gas wells to capital or treating them as operating expense. An election, once made, was to control for all subsequent years. Taxpayer's original return for 1919 capitalized such expenditures. After other facts had been ascertained the taxpayer, February 10, 1921, filed an amended return which treated the expenditures as operating expenses. On neither return was a tax due. The 1920 return again treated such expenditures as operating expenses. Upon audit of the 1920 return the Commissioner ruled the expenditures for that year must be capitalized as the taxpayer had so elected in the 1919 return. The Court states (p. 951):

> "There is no statutory authority for amended returns, but it is well known that the Treasury Department, both in practice and by Regulation (Articles 36 and 111 of Regulations 45) has been liberal in authorizing and accepting such returns."

At page 952, the Court continues stating, that after learning that certain profits for 1919 should have been reported for that year, the taxpayer filed an amended return:

> "This seems to us to constitute the first instance of a mature and deliberate choice by the appellee, based upon knowledge of all the material facts * * * and, in view of the effect of an election upon future returns, we do not think that such election should be held to be effected, unless based upon knowledge of this kind as indicative of a final and deliberate choice. * * * and where the initial return is filed upon incomplete knowledge of the material facts, and before the filing of a return for the subsequent year, the taxpayer ascertains other pertinent facts and files an amended return disclosing them, it seems to us that the initial return may properly be regarded as tentative in its nature. and as not constituting an election. In such case, the taxpayer should be permitted to do what he had the right to do in the first instance."

To this day, amended returns showing correct items of income and deduction are accepted and are necessary in the orderly administration of taxing laws.

This Court has specifically passed on the effect of an amended return in *Zeilerbach Paper Co.* v. *Helvering,* 293 U. S. 172, which involved a question of limitation. Mr. Justice Cardozo states (p. 180):

> "From this administrative history, the inference is compelling that a second return, reporting an additional tax, is an amendment or supplement to a return already upon the files * * *."

The only possible conclusion to be reached from the foregoing is that an amended return must be considered in the same light as the original return. Consequently, in the case at bar, an "election" was made in the "first" return filed.

This is the construction adopted by the Fourth Circuit in *C. H. Mead Coal Co.* v. *Commissioner,* 106 F. (2d) 388, where it was stated: (p. 390)

> "In using the words 'first return' Congress evidently intended to include a completed first return, or a first return as properly amended and did not intend to limit

the taxpayer's right of election to the first form filed. Any other construction would, in fairness to the taxpayer, be too narrow and restricted. A first return is no less a first return because amended, provided the amendment be timely and is made to correct a mistake, made without any intent on the part of the taxpayer to take any undue advantage as to its tax payments, and without any bad faith. A different construction would, as said in the case of *Glenn* v. *Oertel Co.*, 97 Fed. (2d) 495, permit the government to lay a tax upon the taxpayer's errors rather than its income."

Later the Court states:

"* * * we are forced to the conclusion that in all fairnes, and certainly fairness is to be expected from a government in dealing with its taxpayers, the amendment to the return should have been allowed. In rejecting the amendment, the Commissioner was in error."

Still later in the opinion the Court states:

"If an amendment made to correct a mistake, presented within a reasonable time, is rejected through a narrow and harsh construction of the law, to the detriment of the taxpayer, such rejection is arbitrary and unjust. It certainly is not the duty of the Commissioner to deprive a taxpayer of any rights justly due him."

The Court goes further and says:

"We agree with the contention made on behalf of the petitioner that the depletion provisions of the Revenue Acts of 1932 and 1934 are liberalizing, rather than limiting, provisions and that Congress intended to allow depletion deductions by one of the two methods, and intended to give taxpayers a right to elect whichever method they preferred. The decision of the Board in this case deprives the petitioner of that right."

The *Mead* case involved the same statute as the case at bar. The facts in the *Mead* case are that the taxpayer,

when filing its return for 1933, did not claim depletion because it had a loss. However, it attached a statement to its return stating it elected to take percentage depletion for all subsequent years in the case of certain listed properties. In its return for 1934 the taxpayer, acting on the erroneous advice of counsel, did not take depletion. Some time later, as the result of a conversation with a Revenue Agent, the taxpayer decided it had the right to take such depletion. Accordingly, on February 6, 1936, it filed an amended return and claim for refund. The Commissioner disallowed the depletion deduction on the ground the taxpayer had not "elected" to take it in its first return filed under Section 114 (b) (4) of the Revenue Act of 1934. The Board of Tax Appeals sustained the Commissioner. 38 B. T. A. 1163.

The rule, as stated in the cases just mentioned, is in conformity with the established law of construction.

> "It is elementary that an amendment dates back to the filing of the petition and is to supply defects then existing, or at most to bring into the suit grounds of action which existed at the beginning of the case." *Texas Cement Co.* v. *McCord,* 233 U. S. 157, 164.

In the case at bar, the taxpayer merely claimed in the amended return, a deduction to which it was entitled when the first form was filed. It must be remembered that, as stated in the *Mead Coal Company* case, "Congress intended to allow depletion deductions by one of the two methods."

> "The strict letter of an act must, however, yield to its evident spirit and purpose, when this is necessary to give effect to the intent of Congress." *Fleischmann Co.* v. *United States,* 270 U. S. 349, 360.

The Court below relied heavily on *Haggar Co.* v. *Helvering,* 308 U. S. 389. Obviously, that case does not control here, and in reality bears out this taxpayers' contention.

The *Haggar* case involved Sections 215 and 216 of the National Industrial Recovery Act, which imposed a capital stock tax and an excess profits tax based on the value of the

capital stock stated in the "first return" filed under the Act. The statute specifically provided that the capital stock tax value as declared in the return could not be amended. The language of the statute, including the prohibition of amendment of the declared value, was re-enacted into the Revenue Act of 1934, which is the statute involved in the case of bar.

The only logical explanation of the prohibition against amendment of the declared value is that Congress legislated in the light of the established and well known practice of accepting amended returns. If the law had been established to the effect that amended returns were not permissible, the specific prohibition would have been unnecessary. Also, if Congress had intended to prohibit amendments to returns under the section involved in the case at bar, it would have so provided, as it did in the section of the same 1934 statute covering capital stock tax returns.

It should be remembered that in the *Haggar* case, this Court permitted an amendment of the value declared in the first form filed, although the statute specifically provided that the value declared in the "first return" could not be amended. It is true that the amended return was filed within the time permitted for the filing of returns. This Court held, however, the "first return" meant the return for the first year and cited *C. H. Mead Coal Company,* 106 F (2d) 388, as authority for that holding.

This taxpayer contends that the rule of the *Mead* case is the logical rule under the section of the statute here involved, *i. e.,* a "first return" is a "completed first return, or a first return as properly amended," and a taxpayer's right of election is not limited to the first form filed. "A first return is no less a first return because amended, provided the amendment be timely and is made to correct a mistake." The Court held that a "timely" amendment was one made before the time for filing the return for the next succeeding year. It further held that if an amendment made to correct a mistake was filed within a reasonable time and was re-

jected, its rejection was a harsh, arbitrary and unjust construction of the law.[3]

By inference, at least, this Court approved this conclusion by citing the *Mead* case in the Haggar decision.

As pointed out on page 12 Regulations, beginning with Regulations 33 under the 1916 and 1917 Acts, provided for amended returns to correctly show expenses or liabilities for prior years. Such amended returns could be filed any time prior to the expiration of the limitation covering refunds. By practice and regulation continuing to the present time, such amended returns are permissible. In fact, it would be difficult to correct errors if they were not permitted. The Court below States (R. 54): "Art. 43-2 of Regulations 86 (1934 Act) which permits the filing of an amended return for the purpose of deducting a loss occurring during a prior taxable year, but not then ascertained, indicates that such a return may be filed at any time within the period allowed for claiming a refund."

It may very well be, however, that, as the percentage depletion provision was inserted in the law "to avoid administrative complexity," the proper rule when dealing with that section is to limit amended returns to those filed before the return is due for the following year. Such a return was held to be "timely" in the *Mead Coal Company* case. By thus "electing" in the "first return," even if by an amended or completed first return, administrative complexity would be eliminated. The completed return for the first year would thus govern all succeeding years. Actually, however, the taking of cost depletion one year, percentage depletion the next, and vice versa, does not cause any administrative problems in the case of oil and gas wells, where such procedure is permissible, and where nearly all taxpayers use the percentage method. Possibly the more logical explanation of the purpose of avoiding "admini-

[3] The amended return in the *Mead* case was filed February 6, 1936. In the case at bar, the amended return was mailed February 8, 1936, but due to taxpayer's isolated location was not received by the Collector until March 3, 1936.

strative complexity'' was that an election to take percentage depletion would eliminate the battle of experts necessary to determine the essential facts used in computing cost or discovery depletion.

The Court below cites *Pacific National Company* v. *Welch*, 304 U. S. 191, as authority for denying effect to the amended return. The case is typical of a line of cases, some of which are cited in the footnote to the decision below (R. 55) to the effect that a taxpayer who elects to report income by one method cannot later change to an entirely different method.

Illustrations of such situations are when a taxpayer reports on a cash basis and attempts to file an amended return on the accrual basis; a husband and wife file a joint return and later attempt to file separate returns; or, where affiliated corporations file consolidated or separate returns and, later, attempt to change the method.

It is important to note that in the *Pacific National* case, and all other cases of this type, the taxpayer actually had the opportunity of election of one method of reporting income as compared with another. In the case at bar, there was no real election for, as the Board states, (R. 25), ''their 'election' * * * would really have been as between claiming a deduction and not claiming it, for if they did not deduct by use of the percentage method, they could not deduct at all. Not knowing of his (this) statutory right, their collective feeling at the time they executed the 1934 return was that they were not entitled to depletion of any kind.''

In the type of cases mentioned above, the law unquestionably prohibits amended returns, although there are some exceptions, where the facts are unusual.[4] The case at bar, however, does not involve a change of *method*, but deals entirely with an item of deduction which is permitted under the decisions previously mentioned herein.

The *Pacific National* case involved a situation where the taxpayer reported the sale of lots as completed transactions in 1928. In 1931, it filed an amended return of a different

---

[4] See *McIntosh* v. *Wilkinson*, 36 F. (2d) 807.

kind, which computed the gain on the entirely different installment method. This Court held such a change of *method* was improper, stating (p. 194):

> "Change from one *method* to the other, as petitioner seeks, would require recomputation and readjustment of tax liability for subsequent years and impose burdensome uncertainties upon the administration of the revenue laws * * *. There is nothing to suggest that Congress intended to permit a taxpayer, after expiration of the time within which return is to be made, to have his tax liability computed and settled according to some other *method.*" (Italics supplied)

Another line of cases holds that it is a breach of discretion for the Commissioner to refuse to accept amended returns in cases where the taxpayer has scant notice of radical changes in the law. The leading case is *Morrow, Becker & Ewing, Inc.* v. *Commissioner,* 57 F. (2d) 1, which is cited with favor in the *Mead Coal Company* case and wherein the Fifth Circuit states: (P. 3)

> "In views of the radical changes in the law, of which the petitioner had scant notice, if any, in fairness and justice to the taxpayer the returns should have been received and considered. Taxes are assessed on income and not on honest mistakes of the taxpayer. It was the duty of the Commissioner to do nothing arbitrary or unreasonable that would deprive petitioner of rights created by the new law and the regulations thereunder. It was a breach of discretion on the part of the Commisioner not to receive the amended return form for 1925 under the circumstances disclosed."

See also *F. Harold Johnston, Executor,* 33 B. T. A. 551.

In the case at bar, the regulations interpreting the 1934 Act were not released to the public until March 2, 1935, so this taxpayer, because of its isolated position, could not have secured a copy of the regulations prior to March 15, let alone in time to file a return prior to that date.

Election is dependent upon the opportunity to choose between two or more conflicting courses and, in the absence of such opportunity to choose, there can be no election.

The statute specifically states the taxpayer shall "state whether he elects" to have depletion computed on the percentage basis. The Board points out: (R. 25)

> "Had petitioner's officers known of the election provided by the 1934 Act, they would have exercised it. Since petitioner had no basis for cost depletion, their 'election' in the premises, would really have been as between claiming a deduction and not claiming it, for if they did not deduct by a use of the percentage method, they could not deduct at all. Not knowing of his statutory right, their collective feeling at the time they executed the 1934 return was that they were not entitled to depletion of any kind."

This Court will judicially notice that Regulations 86, promulgated under the 1934 Act, were not approved by the Secretary of the Treasury until February 11, 1935. After approval, the regulations were printed and were not released to the public until March 2, 1935, so could not have reached the taxpayer prior to the time for filing the "first" return. (See official print of regulations and Report No. 13, Prentice-Hall 1935 Federal Tax Service, dated March 7, 1935)

It is fundamental that no person can be held to have made an "election" unless advised of the two or more opportunities open to him and he selects one. The rule is stated by Mr. Justice Holmes in *Bierce* v. *Hutchins*, 205 U. S. 340, 346, as:

> "Election is simply what its name imports; a choice, shown by an overt act, between two inconsistent rights, either of which may be asserted at the will of the chooser alone."

Chairman Arundell of the Board of Tax Appeals in his dissenting opinion in *Dorothy Glenn Coal Co.*, 38 B. T. A.,

1154, which involved a construction of the same statute here involved, states: (p. 1162)

> "Election presupposes the existence of the right of a choice between alternatives. *Allis* v. *Hall*, 56 Atl. 637; *Standard Oil Co.* v. *Hawkins*, 74 Fed. 395; *McIntosh* v. *Wilkinson*, 36 F. (2d) 807; *Tide Water Oil Co.*, 29 B. T. A. 1208; 48 Harvard Law Review 1281. To say that one is put to his election when he has no choice is to give him nothing more than a 'Hobson's choice.' The Acts of 1932 and 1934 both use the terms 'elects' and 'election.' These words become meaningless if applied so as to require an election where there is no right of choice."

Lucas v. *Sterling Oil & Gas Co.*, 62 F. (2d) 951, (C. C. A. 6) previously quoted herein at page 14 is likewise authority on the question of "election." To the same effect see *Callie E. Robertson*, 28 B. T. A. 635, 639.

The foregoing clearly shows that "elect" has a judicially settled meaning. Consequently, it must be presumed it was used in that sense by Congress. In *U. S.* v. *Merriam*, 263 U. S. 179, 4 A. F. T. R. 3673, the Supreme Court states: (p 187)

> "The word * * * having the judicially settled meaning which we have stated, we must presume it was used in that sense by Congress." (Citing authorities)

In addition, the provision here involved is remedial. The rule of construction is:

> "The statute is a remedial one and should be construed liberally to carry out the wise and salutary purposes of its enactment." *Stewart* v. *Kahn*, 11 Wall. (78 U. S.) 493, 504.

In addition to the cases previously referred to, the Courts and the Board have had no difficulty with questions similar to the one here involved.

Ralph Leslie Raymond, 34 B. T. A. 117., (acquiesced in by the Commissioner In G. C. M. 19727), C. B. 1938-1,

p. 255, involved an interpretation of Sec. 131 of the 1932 Act, which provides that taxpayers will be allowed credit for foreign taxes paid "if the taxpayer specifies on his return his desire to have the benefits of this section". In that case the taxpayer filed a non-taxable return and did not claim credit for Canadian taxes paid. Upon audit, a loss was disallowed and the Commissioner disallowed the credit under Sec. 131, because the taxpayer had failed to signify on his return that he desired the benefits of this section. The Board in its opinion reviewed the cases on election and properly holds that the taxpayer should prevail.

A similar result was reached in *Connor* v. *U. S.*, 19 F. Supp. 97, 19 A. F. T. R. 683, wherein the Court, construing the foreign tax paid credit section, held "the law should not be interpreted to require the impossible", stating, "the petitioner was not called upon to make any election under Section 131 (a) as the word 'election' signifies a choice between two or more methods."

It should be observed that in the section 131 cases just cited, the taxpayer was, under the Commissioner's rulings, penalized only to the extent of being denied the claimed deduction for one year. Upon appeal, the Commissioner was reversed. In the case at bar, the taxpayer is, under the Circuit Court opinion, going to be perpetually punished by being denied any depletion deduction for all subsequent years.

Point on which case decided not raised before Board of Tax Appeals or Circuit Court of Appeals.

In the Court below, Judge Mathews dissented (R. 58), on the ground that, before the Board of Tax Appeals, the Commissioner made the sole contention that the amended return was not a "first return." Judge Mathews was of the opinion that the said contention should be rejected on the authority of the *Haggar* case. He further said that, as the question of the timeliness of the amended return was

not raised before the Board or the Circuit Court, the Court could not, with propriety, consider or decide any such question.

The dissenting opinion states the law. This Court states in *Helvering* v. *Tex-Penn. Oil Co.*, 300 U. S. 481, 498, as follows:

> "He sought no ruling upon the question from the Board or the lower court and is, therefore, not entitled to have it decided here."

As recently as *Helvering* v. *Wood*, 309 U. S. 344, decided February 26, 1940, and *Helvering* v. *Clifford*, 309 U. S. 331 (April 22, 1940) the same rule was invoked. See also:

General Utilities and Operating Co. v. *Helvering*, 296 U. S. 200.
Helvering v. *Salvage*, 297 U. S. 106.
Rhodes v. *Commissioner*, (C. C. A. 4) 111 F. (2d) 53.
Helvering v. *Achelis*, (C. C. A. 2) 112 F. (2d) 929.

Under the above mentioned authorities this Court cannot, with propriety, consider the question of the timeliness of the amended return.

Respectfully submitted,

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October, 1940.

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No. [redacted] 50

In the Supreme Court of the United States

OCTOBER TERM, 1939

J. E. RILEY INVESTMENT COMPANY, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statute involved	2
Statement	4
Argument	5
Conclusion	8

CITATIONS

Cases:

Haggar Co. v. *Helvering*, No. 176, present Term, decided Jan. 2, 1940 — 6, 7

Helvering v. *Gowran*, 302 U. S. 238 — 8

Helvering v. *Wood*, No. 384, present Term, decided Feb. 26, 1940 — 8

C. H. Mead Coal Co. v. *Commissioner*, 106 F. (2d) 388 — 5, 6, 7

Statute:

Revenue Act of 1934, c. 277, 48 Stat. 680:

Sec. 1 (U. S. C., Title 26, Sec. 1) — 2

Sec. 114 (U. S. C., Title 26, Sec. 114) — 2

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In the Supreme Court of the United States

OCTOBER TERM, 1939

No. 897

J. E. RILEY INVESTMENT COMPANY, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

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BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Board of Tax Appeals (R. 19–28) is unreported. The opinion of the Circuit Court of Appeals for the Ninth Circuit (R. 48–58) is not yet reported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered December 26, 1939. (R. 46.) Petition for rehearing was denied March 16, 1940. (R. 47.) The petition for a writ of certiorari was filed April

11, 1940. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether an election by a taxpayer to compute depletion on a percentage depletion basis is made in its "first return," as required by Section 114 (b) (4) of the Revenue Act of 1934, when it is first made in an amended return, filed after the expiration of the period for filing the original return.

STATUTE INVOLVED

Revenue Act of 1934, c. 277, 48 Stat. 680:

> SEC. 1. APPLICATION OF TITLE.
>
> The provisions of this title shall apply only to taxable years beginning after December 31, 1933. * * *
>
> (U. S. C., Title 26, Sec. 1.)
>
> SEC. 114. BASIS FOR DEPRECIATION AND DEPLETION.
>
> * * * * *
>
> (b) *Basis for Depletion.*—
>
> * * * * *
>
> (4) *Percentage depletion for coal and metal mines and sulphur.*—The allowance for depletion under section 23 (m) shall be, in the case of coal mines, 5 per centum, in the case of metal mines, 15 per centum, and, in the case of sulphur mines or deposits, 23 per centum, of the gross income from the

property during the taxable year, excluding from such gross income an amount equal to any rents or royalties paid or incurred by the taxpayer in respect of the property. Such allowance shall not exceed 50 per centum of the net income of the taxpayer (computed without allowance for depletion) from the property. A taxpayer making his first return under this title in respect of a property shall state whether he elects to have the depletion allowance for such property for the taxable year for which the return is made computed with or without regard to percentage depletion, and the depletion allowance in respect of such property for such year shall be computed according to the election thus made. If the taxpayer fails to make such statement in the return, the depletion allowance for such property for such year shall be computed without reference to percentage depletion. The method, determined as above, of computing the depletion allowance shall be applied in the case of the property for all taxable years in which it is in the hands of such taxpayer, or of any other person if the basis of the property (for determining gain) in his hands is, under section 113, determined by reference to the basis in the hands of such taxpayer, either directly or through one or more substituted bases, as defined in that section.

(U. S. C., Title 26, Sec. 114.)

STATEMENT

The facts as found by the Board of Tax Appeals (R. 19–22) may be summarized as follows:

Petitioner is a Nevada corporation with its principal office and place of business at Flat, Alaska, where it is engaged in the mining of gold. Flat is in a remote part of the Territory, and conditions of travel are such that it takes weeks for mail originating at that place to reach Tacoma, Washington, where the office of the Collector of Internal Revenue having jurisdiction over the petitioner is located. The slowness of the winter service invariably results in current tax return forms reaching Flat too late for timely execution and filing. In order to avoid delinquency, it has been the custom of petitioner's officers to use old return forms; consequently petitioner's original return for 1934 was filed on a 1933 form which had been mailed to it by the Collector at Tacoma. (R. 19–20.)

When petitioner's return for 1934 was made out, its officers did not know of the statutory provision allowing percentage depletion, but did know that, unless the law had been changed, petitioner was not entitled to depletion, as it had no basis for cost depletion. The Collector, in sending the forms, had not advised petitioner with respect to percentage depletion. Had petitioner's officers known of the 1934 statutory provision, they would have elected to take advantage of it. Petitioner first actually learned of the provision in August, 1935, when it

was advised by a revenue agent that it was entitled to percentage depletion for both 1933 and 1934. The agent prepared reports to that effect, as a result of which a refund was paid for 1933, but not for 1934. The Commissioner ruled that, as to the latter year, the taxpayer, by failing to claim percentage depletion in its original return, had lost the right to claim it thereafter. (R. 20–22.)

On March 3, 1936, immediately after petitioner was advised that percentage depletion had been disallowed, it filed both an amended return claiming such depletion and a claim for refund (R. 8, 22). On petition for redetermination, the Board of Tax Appeals upheld the Commissioner's ruling denying percentage depletion (R. 29) and the court below affirmed (R. 46).

ARGUMENT

1. Petitioner urges that certiorari be granted because of an alleged conflict between the decision below and the decision of the Circuit Court of Appeals for the Fourth Circuit in *C. H. Mead Coal Co.* v. *Commissioner*, 106 F. (2d) 388. In the *Mead* case, the taxpayer filed its tax return for 1934 on March 15, 1935, making no claim for a depletion deduction. On February 6, 1936, it filed an amended return for 1934 in which such deduction was claimed, computed on the percentage basis. The court held that the taxpayer was entitled to the deduction on the ground that the words "first return" as used in Section 114 (b) (4) of the Revenue Act of 1934

include an amended return for the first taxable year, "provided the amendment be timely" (p. 390). It apparently considered the amendment to be timely because made before the time for filing the taxpayer's return for the next succeeding year (*id.*).

The court below, in the present case, accepted the basic premise of the *Mead* decision that "first return" includes a timely amendment to an original return for the first tax year. It held, however, that an amendment is not timely unless filed within the time within which an original return may be filed, or within such extended time, not exceeding six months, as has been granted by the Commissioner under Section 53 (a) (2) of the Revenue Act of 1934. The conflict between this decision and the *Mead* decision is, therefore, only on the narrow issue of when an amendment must be filed in order to be timely.

This issue has, we believe, been resolved by the decision of this Court in *Haggar Co.* v. *Helvering*, No. 176, present Term. That case involved the construction of the phrase "first return" as used in the capital stock provisions of the Revenue Act of 1934; the Court held that an amended return, filed during the extended time allowed by the Commissioner for filing the first return under the Act, was a timely return and should have been accepted. Although the question was not directly presented or decided, the clear implication of the opinion is that a return is timely only if filed within the period

allowed for filing original returns. The Court expressly pointed out, for example, that "it has long been the practice of the department, in the cases of other types of tax to accept an amended return, filed within the period allowed for filing returns, as the return of the taxpayer for the taxable year".

This interpretation of the *Haggar* decision is confirmed by the fact that the statute gives no right to file an amended return after the expiration of the statutory period, as extended by the Commissioner, for filing the original return. No statutory provision and no regulation or practice supports the view that an amended return is timely if filed before the time for the filing of the return for the next year. Consequently, when this Court, in its opinion in the *Haggar* case, spoke of a "timely amendment", the time limitation referred to must have been the statutory period for filing original returns.[1]

2. Petitioner also alleges that the court below erred by disposing of the case on a ground not considered by the Board. The case was argued by the Commissioner before the Board, and was decided by the Board, on the theory that an amended return

[1] Although the Court in the *Haggar* case referred to the *Mead* decision as an instance where an amended return was considered as a first return, its citation of that decision clearly does not indicate approval of the holding that the amended return in that case was timely since the Court was not concerned with that question.

was not a "first return" irrespective of the question of timeliness. Petitioner contends that, in this posture of the case, the court below could not with propriety consider or decide the question of the timeliness of the amendment. The contention runs directly counter to the decision of this Court in *Helvering* v. *Gowran,* 302 U. S. 238, holding that a Circuit Court of Appeals may *affirm* a decision of the Board of Tax Appeals upon a theory not presented to or considered by the Board. *Helvering* v. *Wood,* No. 384, present Term, cited by petitioner, holds merely that a decision of a lower court may not be *reversed* on a ground not presented or considered below. That rule is, of course, inapplicable here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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In the Supreme Court of the United States

OCTOBER TERM, 1940

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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT

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INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statute involved	2
Statement	4
Summary of argument	6
Argument	8
Conclusion	24

CITATIONS

Cases:

Alameda Inv. Co. v. *McLaughlin*, 33 F. (2d) 120	13, 18
Briarly v. *Commissioner*, 29 B. T. A. 256	13, 18
Buttolph v. *Commissioner*, 29 F. (2d) 695	13
Champlin v. *Commissioner*, 78 F. (2d) 905	13, 18
Commissioner v. *Moore*, 48 F. (2d) 526, certiorari denied, 248 U. S. 620	13
Commodore Mining Co. v. *Commissioner*, 111 F. (2d) 131	10
Connor v. *United States*, 19 F. Supp. 97	13
Deputy v. *du Pont*, 308 U. S. 488	19
Haggar Co. v. *Helvering*, 308 U. S. 389	10, 11
Helvering v. *Gowran*, 302 U. S. 238	8, 23
Helvering v. *Independent Life Ins. Co.*, 292 U. S. 371	19
Helvering v. *Wood*, 309 U. S. 344	8, 24
Johnston v. *Commissioner*, 33 B. T. A. 551	13
Kehoe-Berge Coal Co. v. *Commissioner*, 41 B. T. A. 282	13, 16, 22
Lucas v. *Sterling Oil & Gas Co.*, 62 F. (2d) 951	13, 16
Mead Coal Co., C. H. v. *Commissioner*, 106 F. (2d) 388	11, 13, 16, 17
Morrow, Becker & Ewing, Inc. v. *Commissioner*, 57 F. (2d) 1	13
New Colonial Ice Co. v. *Helvering*, 292 U. S. 435	19
Pacific National Co. v. *Welch*, 304 U. S. 191	12, 18
Radiant Glass Co. v. *Burnet*, 54 F. (2d) 718	13, 18
Raymond v. *Commissioner*, 34 B. T. A. 1171	13
Rose v. *Grant*, 39 F. (2d) 340	18
United States v. *Pettigrew*, 81 F. (2d) 666	13

Statutes:

Revenue Act of June 6, 1932, c. 209, 47 Stat. 169	6, 21
Revenue Act of 1934, c. 277, 48 Stat. 680:	
Section 23	2, 8, 9, 21
Section 53	2, 10, 13
Section 114	3, 6, 7, 8, 9, 14, 15, 20, 21

258467—40——1

Miscellaneous: Page
I. T. 1372, I—1 Cum. Bull. 238 18
Regulations 86:
Article 43–2 14
Article 53–2 13
Article 53–3 13

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GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the Board of Tax Appeals (R. 19–28) is unreported. The opinions in the Circuit Court of Appeals (R. 48–58) are reported in 110 F. (2d) 655.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered December 26, 1939 (R. 46). Petition for rehearing was denied March 16, 1940 (R. 47). The petition for a writ of certiorari was filed on April 11, 1940, and was granted on May 20, 1940. The jurisdiction of this Court rests upon Section

240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether an election by a taxpayer to compute depletion on a percentage depletion basis is made in its "first return," as required by Section 114 (b) (4) of the Revenue Act of 1934, when it is first made in an amended return, filed after the expiration of the period for filing the original return.

STATUTE INVOLVED

Revenue Act of 1934, c. 277, 48 Stat. 680:

> SEC. 23. DEDUCTIONS FROM GROSS INCOME.
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> In computing net income there shall be allowed as deductions:
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> * * * * *
>
> (m) DEPLETION.—In the case of mines, * * * a reasonable allowance for depletion * * * according to the peculiar conditions in each case; such reasonable allowance in all cases to be made under rules and regulations to be prescribed by the Commissioner, with the approval of the Secretary. * * *
>
> (n) BASIS FOR DEPRECIATION AND DEPLETION.—The basis upon which depletion, exhaustion, wear and tear, and obsolescence are to be allowed in respect of any property shall be as provided in section 114.
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> * * * * *
>
> SEC. 53. TIME AND PLACE FOR FILING RETURNS.

(a) TIME FOR FILING.—

(1) GENERAL RULE.—Returns made on the basis of the calendar year shall be made on or before the 15th day of March following the close of the calendar year. Returns made on the basis of a fiscal year shall be made on or before the 15th day of the third month following the close of the fiscal year.

(2) EXTENSION OF TIME.—The Commissioner may grant a reasonable extension of time for filing returns, under such rules and regulations as he shall prescribe with the approval of the Secretary. Except in the case of taxpayers who are abroad, no such extension shall be for more than six months.

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SEC. 114. BASIS FOR DEPRECIATION AND DEPLETION.

* * * * *

(b) *Basis for Depletion.*—

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(4) *Percentage depletion for coal and metal mines and sulphur.*—The allowance for depletion under section 23 (m) shall be, in the case of coal mines, 5 per centum, in the case of metal mines, 15 per centum, and, in the case of sulphur mines or deposits, 23 per centum, of the gross income from the property during the taxable year, excluding from such gross income an amount equal to any rents or royalties paid or incurred by the taxpayer in respect of the property. Such allowance shall not exceed 50 per centum of the net income of the taxpayer (computed without allowance for depletion) from the

property. A taxpayer making his first return under this title in respect of a property shall state whether he elects to have the depletion allowance for such property for the taxable year for which the return is made computed with or without regard to percentage depletion, and the depletion allowance in respect of such property for such year shall be computed according to the election thus made. If the taxpayer fails to make such statement in the return, the depletion allowance for such property for such year shall be computed without reference to percentage depletion. The method, determined as above, of computing the depletion allowance shall be applied in the case of the property for all taxable years in which it is in the hands of such taxpayer, or of any other person if the basis of the property (for determining gain) in his hands is, under section 113, determined by reference to the basis in the hands of such taxpayer, either directly or through one or more substituted bases, as defined in that section [U. S. C., Title 26, Sec. 114].

STATEMENT

The facts as found by the Board of Tax Appeals (R. 19–22) may be summarized as follows:

Petitioner is a Nevada corporation with its principal office and place of business at Flat, Alaska, where it is engaged in the mining of gold. Flat is in a remote part of the Territory, and conditions of travel are such that it takes weeks for mail orig-

inating at that place to reach Tacoma, Washington, where the office of the Collector of Internal Revenue having jurisdiction over the petitioner is located. The slowness of the winter service invariably results in current tax-return forms reaching Flat too late for timely execution and filing. In order to avoid delinquency, it has been the custom of petitioner's officers to use old return forms; consequently petitioner's original return for 1934 was filed on a 1933 form which had been mailed to it by the Collector at Tacoma (R. 19–20). As pointed out in the Argument, however, the 1933 and 1934 forms were identical in all respects material for purposes of this case (see pp. 20–21, *infra.*)

When petitioner's return for 1934 was made out, its officers did not know of the statutory provision allowing percentage depletion, but did know that, unless the law had been changed, petitioner was not entitled to depletion, as it had no basis for cost depletion. The Collector, in sending the forms, had not advised petitioner with respect to percentage depletion. Had petitioner's officers known of the statutory provision for percentage depletion, they would have elected to take advantage of it. Petitioner first actually learned of the provision in August 1935, when it was advised by a revenue agent that it was entitled to percentage depletion for both 1933 and 1934. The agent prepared reports to that effect, as a result of which a refund was paid for 1933, but not for 1934. The Commis-

sioner ruled that, as to the latter year, the taxpayer, by failing to claim percentage depletion in its original return, had lost the right to claim it thereafter (R. 20–22).[1]

On March 3, 1936, immediately after petitioner was advised that percentage depletion had been disallowed, it filed both an amended return claiming such depletion and a claim for refund (R. 8, 22). On petition for redetermination, the Board of Tax Appeals upheld the Commissioner's ruling denying percentage depletion (R. 29) and the court below affirmed (R. 46).

SUMMARY OF ARGUMENT

1. Petitioner seeks to secure a deduction for depletion for 1934 computed according to the percentage-depletion method provided for in Section 114 (b) (4) of the Revenue Act of 1934. Under the terms of Section 114 (b) (4) the percentage-depletion method may be used only if the taxpayer specifically states in its "first return" under the Act

[1] The reason why a refund was made for 1933 while it was denied for 1934 was that Section 114 (b) (4) of the Revenue Act of 1932 allowed taxpayers to compute depletion on the percentage basis for 1933 without making any statement in their 1933 returns that they elected so to compute depletion. The section required, however, that taxpayers state in their 1933 returns whether they elected to compute depletion on the percentage basis for 1934 and all succeeding years, and provided that if no such election was made the taxpayer would have no right to percentage depletion for 1934 and succeeding years. Section 114 (b) (4) of the Revenue Act of 1934 simply reenacted Section 114 (b) (4) of the 1932 Act, giving, however, a new opportunity of election.

that it elects to adopt this method. Petitioner's "first return" under the Act was its return for the tax year 1934. Its original return for that year contained no statement of election; an amended return, filed after the expiration of the period for filing the original return, did, however, purport to elect the percentage-depletion method.

We believe it plain that a statutory election under the revenue acts, such as that provided for by Section 114 (b) (4), may be made only in the taxpayer's original return or in a timely amendment to the original return, and that an amendment is timely only if filed before the expiration of the period for filing the original return. No other period has any statutory warrant or any precedent in administrative practice. And allowance of an election by amendment filed after the time for filing the original return would, in practice, serve not only to circumvent the statutory scheme but also to impose a substantial administrative burden in the recomputation and readjustment of tax liabilities.

It is immaterial that petitioner was ignorant of the provision for percentage depletion; the construction or application of a statute cannot depend upon the mental state of those affected by it. Moreover, petitioner's ignorance is not readily excusable, since it was more than three years after the provision for percentage depletion was first enacted into law before petitioner discovered its existence.

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It is likewise immaterial that the decision below may work hardship on petitioner; the allowance of deductions does not depend upon considerations of equity. Moreover, the hardship is more apparent than real since petitioner's entire depletable capital has already been restored to it by deductions previously taken on the cost depletion basis.

2. There is no merit to petitioner's contention that the court below erred in disposing of the case on a ground not considered by the Board. In *Helvering* v. *Gowran,* 302 U. S. 238, this Court specifically held that a Circuit Court of Appeals may *affirm* a decision of the Board of Tax Appeals upon a theory not presented to or considered by the Board. *Helvering* v. *Wood,* 309 U. S. 344, cited by petitioner, holds merely that a decision of a lower court may not be *reversed* on a ground abandoned below. That rule is inapplicable here.

ARGUMENT

I

Section 23 (m) of the Revenue Act of 1934 provides that in computing net income, there shall be allowed as a deduction in the case of mines, a "reasonable allowance for depletion". Section 23 (n) provides that the basis upon which depletion is to be allowed shall be as provided in Section 114. And Section 114 (b) (4) provides as follows:

> The allowance for depletion under section 23 (m) shall be, * * * in the case of metal mines, 15 per centum, * * * of the gross income from the property dur-

> ing the taxable year * * *. A taxpayer making his first return under this title in respect of a property shall state whether he elects to have the depletion allowance for such property for the taxable year for which the return is made computed with or without regard to percentage depletion, and the depletion allowance in respect of such property for such year shall be computed according to the election thus made. If the taxpayer fails to make such statement in the return, the depletion allowance for such property for such year shall be computed without reference to percentage depletion. The method, determined as above, of computing the depletion allowance shall be applied in the case of the property for all taxable years in which it is in the hands of such taxpayer, * * *.

It is plain that under this statutory scheme a taxpayer may take percentage depletion for the year 1934 and all succeeding years only if it states in its "first return" under the Act that it elects to compute depletion on this basis.[2] Admittedly, pe-

[2] Petitioner suggests in its brief (p. 8) that Section 23 (m), providing that there shall be a "reasonable allowance for depletion", is substantive in character, that Section 114, specifying the method for computing the allowance, is adjective in character, and, therefore, that failure to comply with the conditions of Section 114 cannot deprive petitioner of the positive right to an allowance granted by Section 23 (m). This contention overlooks Section 23 (n), which expressly provides that the basis for computing the allowance provided for in Section 23 (m) shall be that contained in Section 114. All of these provisions must obviously be read and considered together as parts of a

titioner's "first return" under the Act was its return for 1934. The question here is simply whether an amendment, filed on March 3, 1936, to petitioner's original return for 1934, filed on January 29, 1935, is such a part of the 1934 return that an election to compute depletion on the percentage basis, made for the first time in the amendment, satisfies the requirements of the statute.

The Government does not now contend that an election to take percentage depletion must be made in an original, as distinguished from an amended, return. *Haggar Co.* v. *Helvering,* 308 U. S. 389, is decisive on that issue. The Government's position is simply that the election may be made only in an original return or in a *timely* amendment, and that an amendment is timely only if it is filed within the period provided by the statute for filing the original return. Here the amendment was not filed until after the expiration of the statutory period for filing the original return.[3]

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whole; so considered, it is plain that Congress intended in Section 23 (m) to grant a deduction computed in the manner set forth in Section 114 and not otherwise. *Commodore Mining Co.* v. *Commissioner*, 111 F. (2d) 131, 133 (C. C. A. 10th). Moreover, since petitioner has already recovered its capital through depletion allowances based on cost (R. 21), it is difficult to see how it could claim any deduction representing a "reasonable allowance for depletion" without relying upon the percentage depletion provision of Section 114.

[3] Petitioner's original return for 1934 was required to be filed on or before March 15, 1935 (Section 53 (a) (1) of the Revenue Act of 1934). The Commissioner had authority to extend this statutory period to September 15, 1935 (Sec-

Haggar Co. v. *Helvering, supra,* is persuasive authority in support of the Government's position. That case involved the construction of the phrase "first return" as used in the capital stock provisions of the Revenue Act of 1934; the Court held that an amended return, filed within the extended period allowed by the Commissioner for filing the original return for the first year, was a timely return and should have been accepted. Throughout the opinion, stress is laid upon the fact that the amendment should have been accepted because it was timely, and the clear implication of the opinion is that it was timely because it was filed within the period allowed for filing original returns. The Court expressly pointed out, for example, that "it has long been the practice of the department, in the cases of other types of tax to accept an amended return, filed within the period allowed for filing returns, as the return of the taxpayer for the taxable year" (308 U. S. at 393–394).[4]

Interpretation of the *Haggar* case to allow an election by amendment only within the time allowed for filing original returns accords with the

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tion 53 (a) (2)) but no authority whatever to accept a return filed after that date. The amendment involved in this case was not filed until March 3, 1936 (R. 8, 22).

[4] Although the Court in the *Haggar* case referred to *C. H. Mead Coal Co.* v. *Commissioner*, 106 F. (2d) 388 (C. C. A. 4th), as an instance where an amended return was considered as a first return, its citation of that decision clearly does not indicate approval of the holding that the amended return in that case was timely since the Court was not concerned with that question.

opinion expressed by this Court in *Pacific National Co.* v. *Welch,* 304 U. S. 191. The taxpayer there, in filing its original return on March 14, 1929, elected to report its profits from realty sales according to the deferred-payment method. In 1931, it filed an amended return claiming that the profits should have been computed according to the installment method. In holding that the taxpayer was bound by the election it exercised in filing the original return, this Court stated (pp. 194–195):

> Change from one method to the other, as petitioner seeks, would require recomputation and readjustment of tax liability for subsequent years and impose burdensome uncertainties upon the administration of the revenue laws. It would operate to enlarge the statutory period for filing returns (§ 53 (a)) to include the period allowed for recovering overpayments (§ 322 (b)). *There is nothing to suggest that Congress intended to permit a taxpayer, after expiration of the time within which return is to be made, to have his tax liability computed and settled according to the other method. By reporting income from the sales in question according to the deferred payment method, petitioner made an election that is binding upon it and the commissioner.* [Emphasis supplied]

The current of authority in the lower federal courts and in the Board of Tax Appeals is likewise to the effect that a statutory right of choice under the revenue acts "is exhausted on the expiration of

the time for filing returns." *Buttolph* v. *Commissioner,* 29 F. (2d) 695, 696 (C. C. A. 7th); *Commissioner* v. *Moore,* 48 F. (2d) 526 (C. C. A. 10th), certiorari denied, 284 U. S. 620; *Rose* v. *Grant,* 39 F. (2d) 340 (C. C. A. 5th); *Alameda Inv. Co.* v. *McLaughlin,* 33 F. (2d) 120 (C. C. A. 9th); *Radiant Glass Co.* v. *Burnet,* 54 F. (2d) 718 (App. D. C.); *Champlin* v. *Commissioner,* 78 F. (2d) 905 (C. C. A. 10th); *United States* v. *Pettigrew,* 81 F. (2d) 666 (C. C. A. 9th); *Kehoe-Berge Coal Co.* v. *Commissioner,* 41 B. T. A. 282; *Briarly* v. *Commissioner,* 29 B. T. A. 256.[5]

No other time limitation has any statutory warrant. The Revenue Act of 1934 provides for the filing of returns, made on the basis of the calendar year, on or before the 15th day of March following the close of the calendar year (Section 53 (a) (1)); it further provides that the Commissioner may grant a reasonable extension of time for filing returns, not exceeding six months in the case of resident taxpayers, under such rules and regulations as he may prescribe (Section 53 (a) (2)).[6] Under the rationale of the *Haggar* decision, taxpayers have a right to amend their returns at any time prior to

[5] Looking the other way are *C. H. Mead Coal Co.* v. *Commissioner,* 106 F. (2d) 388 (C. C. A. 4th); *Lucas* v. *Sterling Oil & Gas Co.,* 62 F. (2d) 951 (C. C. A. 6th); *Morrow, Becker & Ewing, Inc.* v. *Commissioner,* 57 F. (2d) 1 (C. C. A. 5th); *cf. Johnston* v. *Commissioner,* 33 B. T. A. 551; *Raymond* v. *Commissioner* 34 B. T. A. 1171; *Connor* v. *United States,* 19 F. Supp. 97 (D. N. H.).

[6] See Articles 53-2 and 53-3, Regulations 86.

the expiration of the statutory period, as extended by the Commissioner, for filing the returns. But there is no statutory provision, and no regulation or practice,[7] which supports the view that an amendment may be filed as of right after the expiration of the statutory period for filing the original return. To graft a period for filing amendments on to the statutory period for filing original returns would in effect be to enlarge the period for filing returns without any legislative sanction therefor.

It is significant that percentage depletion was first allowed with respect to metal mines in the Revenue Act of 1932. Section 114 (b) (4) of that Act allowed taxpayers to take percentage depletion for 1933, and required them to state in their 1933 returns whether they elected to compute depletion on this basis for 1934 and all succeeding years; the depletion allowance for 1934 and subsequent years was to be computed in accordance with the election made in the 1933 returns. Section 114 (b) (4) of the 1934 Act reenacted Section 114 (b) (4) of the 1932 Act, but gave a new opportunity of election. It seems apparent that if, as petitioner contends, an election may be made by amendment to the original return after the expiration of the

[7] This is subject to the exception of Article 43-2 of Regulations 86, which permits the filing of an amended return for the purpose of deducting a loss, occurring during a prior taxable year but not then ascertained, at any time within the period allowed for claiming a refund.

period for filing the original return, there would have been no necessity for Congress to have given taxpayers a new opportunity of election in the 1934 Act; taxpayers who failed to elect to take percentage depletion in their 1933 returns could simply have filed an amendment to that return, making the election in the amendment. Thus, the fact that Congress deemed it necessary expressly to provide for a new opportunity of election is strong indication that it did not believe that the statutory choice provided for by Section 114 (b) (4) could be exercised by amendment after the period for filing original returns had expired.

Practical considerations, too, support the view that an election to take percentage depletion may not be made by amendment after expiration of the period for filing original returns. In one year, cost depletion may appear to a given company to be more advantageous than percentage depletion; a year later percentage depletion may appear to be the more advantageous. If an election between these methods of computation is subject to change by amendment after the expiration of the statutory period for filing returns, taxpayers would be given an opportunity to shift bases in the light of developments occurring after the original choice was required to be made. And, since there is no legal limit to the number of amended returns, a taxpayer could presumably change from one method to another as often as he saw fit. This would not only adversely affect the revenues but would also

entail a real administrative burden in the recomputation and readjustment of tax liabilities. It seems obvious that avoidance of this very type of shift was the motive compelling Congress to provide that the election must be made in the first return and that failure to elect percentage depletion in the first return should deprive the taxpayer of this method of computation in all subsequent years. Cf. *Kehoe-Berge Coal Co.* v. *Commissioner*, 41 B. T. A. 282, 286–287.

It is no answer for petitioner to say that since it could take no allowance for depletion on a cost basis, no opportunity for a shift in basis would be created by a decision allowing it to amend its return. The construction of an Act of Congress obviously cannot be affected by the exigencies of the situation in which the particular taxpayer before the court finds itself. If petitioner has a right to make its election in an amendment filed after the expiration of the statutory period for filing the original return, other taxpayers, to whom an opportunity to shift may be of substantial value, must have a similar right.

The Circuit Court of Appeals for the Fourth Circuit attempted to solve this problem in *C. H. Mead Coal Co.* v. *Commissioner*, 106 F. (2d) 388, by ruling that an amendment is timely if filed before the time for the filing of the return for the next succeeding year. Accord: *Lucas* v. *Sterling Oil & Gas Co.*, 62 F. (2d) 951 (C. C. A. 6th). There is nothing in the opinions in either the *Mead* or *Sterl-*

ing Oil cases, and nothing in petitioner's brief in the present case, which reveals any logical, to say nothing of any statutory, basis for selecting as the limitation period the time for filing original returns for the next succeeding year. And this judge-made rule, although limiting the opportunity for changing methods of computation to one year, yet allows a shift to be made during that year, contrary to the obvious intent of Congress.

Petitioner seeks to support the *Mead* decision on the ground that the Treasury Department, in practice, has been liberal in authorizing and accepting amended returns filed after the period for filing original returns, and that this alleged practice must be deemed to have been incorporated into the law (Br. 12–20). The contention fails to distinguish between amendments designed simply to correct errors and miscalculations in the original return and amendments designed to change the basis upon which taxable income was computed in the original return. The duty of the Commissioner to assure that net income is correctly reported and the tax thereon correctly computed necessarily carries with it authority to accept and, indeed, occasionally to require, amended returns truly reflecting items of income and deductions which were misreported in the original return. The Treasury rulings referred to by petitioner as establishing the administrative practice with respect to amended returns (Br. 12–13) all relate to matters of this character.

But the Commissioner has no authority to accept, and has not accepted in practice, amendments which, rather than being designed to reflect true income by correcting mistakes, are designed simply to allow the taxpayer to take advantage of a statutory choice between different methods of reporting income, after the expiration of the statutory period provided for making the choice. Thus, where a husband and wife file a joint return, the Commissioner has no authority to permit, and has not permitted, the filing of separate returns after the statutory period for filing returns has expired (*Rose* v. *Grant*, 39 F. (2d) 340 (C. C. A. 5th); *Buttolph* v. *Commissioner*, 29 F. (2d) 695 (C. C. A. 7th); *Champlin* v. *Commissioner*, 78 F. (2d) 905 (C. C. A. 10th); I. T. 1372, I–1 Cum. Bull. 238); where affiliated corporations file separate returns, the Commissioner has no authority to permit, and has not permitted, a change by untimely amendment to a consolidated return (*Alameda Inv. Co.* v. *McLaughlin*, 33 F. (2d) 120 (C. C. A. 9th); *Radiant Glass Co.* v. *Burnet*, 54 F. (2d) 718 (App. D. C.)); where profits from realty sales are originally reported according to the deferred-payment method, the Commissioner has no authority to permit, and has not permitted, the filing of an untimely amendment computing the profits according to the installment method (*Pacific National Co.* v. *Welch*, 304 U. S. 191). The present situation is of the same type: the taxpayer is attempting to

change the method adopted in its original return for computing its depletion allowance by taking advantage of a statutory right of choice after the statutory period for making the choice has terminated. For this, administrative practice furnishes no precedent whatever.

Petitioner also seeks to support its position by pointing to the apparent inequity and hardship which would be imposed upon it by the construction of the statute for which we contend. It urges, in effect, that by reason of its remote location in Alaska, it never had an opportunity to elect between cost and percentage depletion and that therefore its failure to elect percentage depletion should not be considered binding upon it. The primary factual basis for this contention is that the slowness of the mails required it to file its return for 1934 on a 1933 form.

Considerations of equity seem hardly material to the question of whether, under the statute, petitioner has a right to the deduction which it claims. The allowance of deductions does not turn on general equitable considerations. *Deputy* v. *du Pont*, 308 U. S. 488, 493. Congress may condition, limit, or deny deductions in any manner it sees fit (*Helvering* v. *Ind. Life Ins. Co.*, 292 U. S. 371) and only such deductions as may be brought squarely within the four corners of the statute can be allowed (*New Colonial Ice Co.* v. *Helvering*, 292 U. S. 435). It may be, as petitioner contends, that it was the

purpose of Congress in enacting Section 114 (b) (5) to liberalize depletion allowances, but if so, as the court below pointed out, "the liberality was confined to the offer" and "did not extend to the time or manner of taking advantage of it" (R. 56).

In any event, the equities upon which petitioner relies are more apparent than real. Specifically, the fact that petitioner was forced to file its 1934 return on a 1933 instead of a 1934 form is entirely immaterial, since the instructions contained on the two forms with respect to depletion were almost identical. The 1933 forms were promulgated under the Revenue Act of 1932. As we have pointed out, Section 114 (b) (4) of that Act allowed taxpayers to take percentage depletion for 1933 with respect to metal mines and required them to state in their 1933 returns whether they elected to compute depletion on this basis for 1934 and all succeeding years. Section 114 (b) (4) of the 1934 Act simply reenacted Section 114 (b) (4) of the 1932 Act, giving, however, a new opportunity of election.

The instructions appended to the 1933 forms provided as follows with respect to depletion (R. 21):

> 23. DEPLETION.—If a deduction is claimed on account of depletion, secure from the collector Form D (minerals), Form E (coal), Form F (miscellaneous non-metals), Form O (oil and gas), or Form T (timber), fill in and file with return. If complete valuation data have been filed with Questionnaire in

> previous years, then file with this return information necessary to bring your depletion schedule up to date, setting forth in full statement of all transactions bearing on deductions or additions to value of physical assets with explanation of how depletion deduction for the taxable year has been determined. See Sections 23 (1) and 114 of the Revenue Act of 1932.

The instructions with respect to depletion appended to the 1934 forms were precisely the same as the instructions appended to the 1933 forms except that the reference in the last sentence was to Sections 23 (m) and 114 of the Revenue Act of 1934 instead of to Sections 23 (1) and 114 of the Revenue Act of 1932.

These facts, we believe, considerably dilute the equity which petitioner seeks to create by pointing to its remote location. Ever since the enactment of the Revenue Act of 1932 on June 6, 1932 (c. 209, 47 Stat. 169) petitioner had the right to elect to take percentage depletion. That it remained ignorant of the law from that time until August 1935, when a revenue agent advised petitioner as to the provision for depletion allowance, cannot, we submit, be attributed solely to the remote location of the company and cannot serve as a basis for according the petitioner special consideration.

Nor is any special equity created by the fact that petitioner's failure to elect percentage depletion may deprive it of all allowance for depletion in the

future. If this be the case, it is only because petitioner has already recovered its capital through depletion allowances based on cost. Plainly, if petitioner has had its depletable capital restored to it by deductions previously allowed, the grant of a further allowance for depletion must be based on other than equitable considerations.

Moreover, it is not at all certain that petitioner will not in the future be entitled to an allowance for depletion on the cost basis. As the Board of Tax Appeals pointed out in *Kehoe-Berge Coal Co.* v. *Commissioner,* 41 B. T. A. 282, 286, development costs are a commonplace in the mining industry and improvements, extensions, and other capital expenditures can, under appropriate circumstances, place a mining enterprise in a position where a cost basis is created. This being so, it is impossible to state categorically that petitioner's failure to elect percentage depletion will deprive it of all depletion allowance for the future, or, indeed, that cost depletion may not ultimately prove beneficial to it.

We submit, therefore, that neither the statute which controls decision, nor the special equities upon which petitioner relies, support petitioner's contentions. To the contrary, the statutory scheme seems clearly to require that the taxpayer make an election on or before the date on which its original return must be filed and that it be denied the right thereafter to alter its choice. This taxpayer made

its election in its 1934 return by failing to state its preference for percentage depletion. Upon the expiration of the time for filing the 1934 return, that election became final and petitioner became bound, not only for 1934 but for all subsequent years. That petitioner was ignorant of the law and that this ignorance was the reason for its failure to elect percentage depletion cannot affect the result; the statute contains no saving clause relieving a taxpayer, or authorizing the Commissioner to relieve him, from the consequences of the rule on a showing that he was ignorant of it. And surely, as the court below pointed out (R. 57), the meaning of the statute cannot be varied to meet the mental state of those affected by it.

II

There is no merit in petitioner's contention that the court below erred in disposing of the case on a ground not considered by the Board. The case was argued by the Commissioner before the Board, and was decided by the Board, on the theory that an amended return was not a "first return" irrespective of the question of timeliness. Petitioner urges that, in this posture of the case, the court below could not with propriety consider or decide the question of the timeliness of the amendment. The contention runs directly counter to the decision in *Helvering* v. *Gowran,* 302 U. S. 238, holding that a Circuit Court of Appeals may affirm a decision of

the Board of Tax Appeals upon a theory not presented to or considered by the Board. *Helvering* v. *Wood,* 309 U. S. 344, cited by petitioner, holds merely that a decision of a lower court may not be reversed on a ground abandoned below. That rule is, of course, inapplicable here.

CONCLUSION

The judgment of the court below should be affirmed.

Respectfully submitted.

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OCTOBER 1940.

U. S. GOVERNMENT PRINTING OFFICE: 1940

SUPREME COURT OF THE UNITED STATES.

No. 50.—October Term, 1940.

J. E. Riley Investment Company, Petitioner, *vs.* Commissioner of Internal Revenue. | On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

[November 12, 1940.]

Mr. Justice Douglas delivered the opinion of the Court.

This case is here on certiorari to resolve the conflict of the decision below (110 F. (2d) 655) with *C. H. Mead Coal Co.* v. *Commissioner*, 106 F. (2d) 388.

Petitioner is engaged in the business of mining gold at Flat, Alaska. The winter mail service to and from that remote place was so uncertain and slow that, in order to avoid delinquency in income tax returns, petitioner's officers were accustomed to use the forms for an earlier year. Consequently petitioner's original return for the calendar year 1934 was filed on a 1933 form which had been mailed to petitioner by the Collector at Tacoma, Washington. This return was executed on January 2, 1935, and reached Tacoma on January 29, 1935. When it was executed petitioner did not know of the provision[1] in the Revenue Act of 1934 (48 Stat. 680) allowing percentage depletion. But petitioner did know that unless the law had been changed it was not entitled to depletion, as it had no basis for cost depletion. The Collector in sending the 1933 forms had not

[1] Section 114(b)(4) provided:

"The allowance for depletion under section 23 (m) shall be, in the case of coal mines, 5 per centum, in the case of metal mines, 15 per centum, and, in the case of sulphur mines or deposits, 23 per centum, of the gross income from the property during the taxable year, excluding from such gross income an amount equal to any rents or royalties paid or incurred by the taxpayer in respect of the property. Such allowance shall not exceed 50 per centum of the net income of the taxpayer (computed without allowance for depletion) from the property. A taxpayer making his first return under this title in respect of a property shall state whether he elects to have the depletion allowance for such property for the taxable year for which the return is made computed with or without regard to percentage depletion, and the depletion allowance in respect of such property for such year shall be computed according to the election thus made. If the taxpayer fails to make such statement in the return, the depletion allowance for such property for such year shall be computed without reference to per-

advised petitioner with respect to percentage depletion. And it was found that if petitioner had known of the statutory provision for percentage depletion, it would have elected to take advantage of it. Petitioner first actually learned of the provision in August, 1935. On March 3, 1936, petitioner filed an amended return for 1934 upon which a deduction of percentage depletion was taken; and it asked for a refund. The Board of Tax Appeals upheld the Commissioner's ruling denying percentage depletion and the Circuit Court of Appeals affirmed.

Sec. 114(b)(4) of the 1934 Act required the taxpayer to elect in his "first return" whether the depletion allowance was to be computed with or without regard to percentage depletion. The method so elected is applicable not only to the year in question but to all subsequent taxable years.

We think that petitioner's amended return, filed on March 3, 1936, was not a "first return" within the meaning of § 114(b)(4). By § 53(a)(1) of the 1934 Act, the return was due on or before March 15, 1935. By § 53(a)(2) the Commissioner was empowered to grant a reasonable extension for filing returns[2] but, so far as applicable here, not exceeding six months. *Haggar Co.* v. *Helvering*, 308 U. S. 389, would compel the conclusion that had the amended return been filed within the period allowed for filing the original return, it would have been a "first return" within the meaning of § 114(b)(4). But we can find no statutory support for the view that an amendment making the election provided for in that section may be filed as of right after the expiration of the statutory period for filing the original return.

We are not dealing with an amendment designed merely to correct errors and miscalculations in the original return. Admittedly the Treasury has been liberal in accepting such amended returns even though filed after the period for filing original returns.[3] This, however, is not a case where a taxpayer is merely demanding a correct computation of his tax for a prior year based on facts as they

centage depletion. The method, determined as above, of computing the depletion allowance shall be applied in the case of the property for all taxable years in which it is in the hands of such taxpayer, or of any other person if the basis of the property (for determining gain) in his hands is, under section 113, determined by reference to the basis in the hands of such taxpayer, either directly or through one or more substituted bases, as defined in that section."

[2] See Treasury Regulations No. 86, Arts. 53-1—53-4 inc.

[3] See, for example, Treasury Regulations No. 86, Art. 43-2, governing the filing of amended returns for the purpose of deducting losses which were sustained during a prior taxable year. Cf. *Union Metal Mfg. Co.*, 1 B. T. A. 395.

existed. Petitioner is seeking by this amendment not only to change the basis upon which its taxable income was computed for 1934 but to adopt a new method of computation for all subsequent years. That opportunity was afforded as a matter of legislative grace; the election had to be made in the manner and in the time prescribed by Congress. The offer was liberal. But the method of its acceptance was restricted. The offer permitted an election only in an original return or in a timely amendment. An amendment for the purposes of § 114(b)(4) would be timely only if filed within the period provided by the statute for filing the original return. No other time limitation would have statutory sanction. To extend the time beyond the limits prescribed in the Act is a legislative not a judicial function.

Strong practical considerations support this position.

If petitioner's view were adopted, taxpayers with the benefit of hindsight could shift from one basis of depletion to another in light of developments subsequent to their original choice. It seems clear that Congress provided that the election must be made once and for all in the first return in order to avoid any such shifts. And to require the administrative branch to extend the time for filing on a showing of cause for delay would be to vest in it discretion which the Congress did not see fit to delegate.

Petitioner urges that this result will produce a hardship here. It stresses the fact that it had no actual knowledge of the new opportunity afforded it by § 114(b)(4) of the 1934 Act and that equitable considerations should therefore govern. That may be the basis for an appeal to Congress in amelioration of the strictness of that section. But it is no ground for relief by the courts from the rigors of the statutory choice which Congress has provided.

Finally, petitioner asserts that we cannot consider the question of the timeliness of the amended return since before the Board of Tax Appeals and the Circuit Court of Appeals respondent urged only that petitioner's claim was based upon an amended, rather than an original, return. But even on the assumption that that issue did not embrace the question of timeliness, the Circuit Court of Appeals was justified in affirming the decision of the Board of Tax Appeals. Where the decision below is correct it must be affirmed by the appellate court though the lower tribunal gave a wrong reason for its action. *Helvering* v. *Gowran*, 302 U. S. 238, 245-246.

Affirmed.